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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

C. A.
1918
April 11.

In re LOVELESS.
FARRER *v.* LOVELESS.

[1917 L. 726.]

Will—Construction—Gift of "a clear annuity"—Income Tax payable by Annuitant.

Testator gave his residuary real and personal estate to trustees upon trust, as to a share thereof, to pay to his wife out of the income "a clear annuity of 2000*l.* during her widowhood," and in the event of her marrying again, then, during the remainder of her life, a clear reduced annuity of 1000*l.* :—

Held, that the annuity was not given free of income tax.

Decision of Eve J. [1918] 1 Ch. 223 affirmed.

APPEAL from a decision of Eve J. (1), where the facts are fully stated.

The testator's widow appealed.

Romer, K.C., and *Sanger*, for the appellant. The testator has directed that his widow is to have a "clear annuity" of 2000*l.*, and if income tax is to be deducted she will not get a "clear" annuity of that amount. The word "clear" must mean "clear of everything"; it imports the gift of a net amount. First of all it is a question of construction of the will, and not of the Income Tax Acts.

(1) [1918] 1 Ch. 223.

C. A. 1918 — LOVELESS, *In re.* FARRER *v.* LOVELESS.

There are numerous authorities on the words " free from all deductions " and " clear of all duties," &c., but there is no case where the word " clear " used by itself has been construed. The nearest case to the present is *In re Bannerman's Estate* (1), where the testator gave his wife annuities or clear yearly sums " free from all deductions in respect of any present or future taxes, charges, assessments, impositions, or other matter, cause, or thing whatsoever," and Hall V.-C. held that the widow was entitled to be paid free from deductions in respect of income tax. There is nothing in the present case to prevent the Court from giving full effect to the word " clear." The latest authority is *In re Saillard* (2), where an annuity was given " free of all duties," and it was held that that expression did not extend to and include income tax; see also *Peareth* v. *Marriott* (3) and *Gleadow* v. *Leetham.* (4) It may be contended that if the annuity in this case is to be free of income tax the trustees will have difficulty in exercising the power of appropriation, for they cannot say in advance what the tax may amount to. But that difficulty would equally arise if the annuity were expressly given free of income tax. [They also referred to the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 102, the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40, and the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24, sub-s. 3.]

E. P. Hewitt, K.C., and *F. E. Farrer*, for the respondents, the residuary legatees, were not called upon to argue.

J. M. Paterson, for the trustees.

SWINFEN EADY L.J. (after stating the facts). The question raised by this appeal is whether under these circumstances the gift to the wife of a clear annuity of 2000*l.* amounts to a gift to her of that sum free of income tax; in other words, whether in addition to the annuity of 2000*l.* the will contains an additional bequest of the income tax payable in respect of the annuity. It is contended for the appellant that by the use of the words " a clear annuity " there is meant an annuity, not only clear of and from all death duties, but also clear of income tax. It is argued that unless in addition to the annuity the income tax is paid, it cannot be said that the widow does

(1) (1882) 21 Ch. D. 105.
(2) [1917] 2 Ch. 401.
(3) (1882) 22 Ch. D. 182.
(4) (1882) 22 Ch. D. 269.

receive "a clear annuity." It is obvious from clause 12 of the will that the testator had in his mind that annuities bequeathed by the will might be subject to duty; that clause expressly directs that the legacies, pecuniary or otherwise, "are to be paid and enjoyed free of estate, settlement estate, legacy, or succession duty." That is applicable to the legacies and the annuities previously given: it is not applicable to the wife's annuity in terms. Then comes, in a subsequent part of the will, the direction to pay to the wife "a clear annuity of 2000*l*." In administering the estate that has been held to give, and in my opinion does give, the wife an annuity clear of the deductions that would otherwise be made from it: it would give it clear of the legacy duty, which is now payable by the wife, and it would also give it free from that part of the estate duty which would be payable out of the real estate, and I understand that in the administration that course has been followed; but the further question is whether it is also given free of income tax. The learned judge has held that it is not. In my opinion he was right in so holding. What is given is "a clear annuity."

Now under the provisions of the Income Tax Acts an annuity is chargeable with income tax. It is charged under the Act of 1842 (5 & 6 Vict. c. 35), which provides by s. 102: "Upon all annuities, yearly interest of money, or other annual payments whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will"—this is an annuity given by a will—"or otherwise, or as a reservation thereout, or as a personal debt," and so on, "there shall be charged for every 20*s*. of the annual amount thereof the sum of"—and then the duty is charged; and then it contains a provision inserted in the proviso that in every case where it is payable out of profits or gains brought into charge by virtue of the Act no assessment shall be made upon the person entitled to the annuity, interest, or other annual payment, "but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorized to deduct out of such annual

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payment" the duty. Then by s. 40 of the Act of 1853 (16 & 17 Vict. c. 34) the provision is extended, because that provides: "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorized, on making such payment, to deduct and retain thereout" the amount of the duty; and then it contains this provision: "and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable"; and then under s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), there is a direction in the events provided for by that sub-s. 3 that the person paying shall deduct the rate of income tax.

In my opinion, having regard to the true construction of the Income Tax Acts, a clear annuity is paid to an annuitant where there is paid first the duty and then the balance making up the full sum given to the annuitant. In the present case, if the income tax be first paid on the 2000*l.* and then the balance of 2000*l.* be paid to the annuitant, there is paid to the annuitant a clear annuity of 2000*l.* She has it clear of all estate duty, all legacy duty, and all duties payable under the will; she has a clear annuity and the tax is paid out of the annuity—out of money that would otherwise be payable in cash to the annuitant. The tax is paid to the tax collector out of the annuity, and it is as much paid to the annuitant as if it had actually been paid to the person to whom the payment is due and payable, that is to say, the widow. In my opinion, where there is a gift of an annuity or a clear annuity, or an annuity free from deduction or abatement, the annuitant has to bear the income tax, and the annuity is not given free of income tax; or in other words, the will is not to be read and construed as if it contained a gift of the annuity and of an additional sum equivalent to the income tax payable on it. In my opinion it is accurate to say, repeating words that I used in *In re Saillard* (1), "If the annuity is directed

(1) [1917] 2 Ch. 401, 403.

to be payable without any deduction whatever, or if the words were a clear yearly sum free from all deductions and abatement whatsoever, such a gift in those terms is not sufficient to give to the legatee the income tax in addition, but he must bear his own income tax."

For these reasons I am of opinion that the judgment below was right and that the widow must bear the income tax payable in respect of the annuity, and that the will cannot be read and construed as if the annuity were given free of tax. I think *Peareth* v. *Marriott* (1), before Bacon V.-C., and *Gleadow* v. *Leetham* (2), before Kay J., are sound decisions, and that the rule there laid down is the rule that must prevail. For these reasons I am of opinion that the appeal fails and must be dismissed.

BANKES L.J. I agree. The question which we have to decide is as to the construction of the language used by this testator in the will which he made. The two words which are really before us for construction are the words "clear annuity." We are asked to decide this matter as a question of the construction of the will alone, and it is said that the question before the Court is not one as to the construction of the Income Tax Acts, but merely as to the construction of the will. With that view I do not quite agree. It is a question of the construction of the will, but it is a question as to the construction of the language of the will having regard to the provisions of the Income Tax Acts, and having regard to the nature of the incidence of income tax upon an annuity.

It seems to me to have been decided, apart from the language of the statutes, that in the case of an annuity which is paid out of gains and profits brought into charge, although the statutes use the word "deduction" in reference to the duty of the persons who have to make the payment of the annuity, yet, when you are considering the effect of the Act in reference to the annuitant, the position is that the payment of the tax is really a payment by the annuitant, though, for the protection of the Revenue, it is made by the person paying the annuity on behalf of the annuitant. Whether you treat the language of s. 40 of the Act of 1853, which provides that "the person liable to such payment shall be acquitted and

(1) 22 Ch. D. 182. (2) 22 Ch. D. 269.

C. A. 1918

LOVELESS, *In re.* FARRER *v.* LOVELESS.

Bankes L.J.

discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable," as in substance providing that the annuitant shall have been deemed to have made the payment; or whether you treat the matter, as it was treated by Bacon V.-C. in *Peareth* v. *Marriott* (1), where he says " Any person who has to pay the income (and the Legislature takes this sort of collateral security for the payment), is bound, before he pays, to make a deduction consistent with the law on the subject "—the Vice-Chancellor there treating the payment by the person who has to pay the income as a sort of collateral security provided by the Legislature for the payment of the amount—and hold that the tax is an amount really payable by the annuitant; or whether you take the view taken by Kay J. in *Gleadow* v. *Leetham* (2), where he says this: " If, however, income tax be not a deduction, but a payment which she has to make herself, not out of the annuity, but because she receives the annuity, I do not consider that the word 'clear' carries the matter any further "—whichever way you look at it it seems to me that the result must be the same, namely, that the " deduction "—and I am using the word " deduction " because that is the word used in the Income Tax Acts—is made by the person liable to make the payment, for the security of the Legislature, and, as I may perhaps put it, as statutory agent for the annuitant; and the amount which the annuitant receives, though less by the amount of the income tax, is none the less a payment, by the person liable to pay, of a clear annuity of the full amount.

NEVILLE J. I agree.

Appeal dismissed.

Solicitors: *Farrer & Co.; Young, Jackson, Beard & King.*

(1) 22 Ch. D. 188. (2) 22 Ch. D. 273.

G. A. S.

JONES *v.* TRINDER, CAPRON & CO.

[1918 J. 277.]

C. A.
1918
NEVILLE J.
March 27.
C. A.
April 15.

Master and Servant—Agreement of Service—Action for alleged Breach—Alteration in original Agreement—Alleged Forgery—Action settled on Terms—Original Agreement destroyed—Affidavits taken off File—Subsequent User of Copies of alleged Forgery and Affidavits—Action for Injunction—Implied Condition.

In 1916 an action in which the present defendants (a firm of solicitors) were plaintiffs and claimed an injunction to restrain the present plaintiff (who had been a clerk in their employ) from committing an alleged breach of a restrictive clause in his agreement of service with them was settled on terms embodied in an order of the Court. The agreement of service contained an alteration which the firm alleged and the clerk denied was a forgery. The order provided that the agreement of service should be destroyed and that certain affidavits should be taken off the file, but contained no direction as to the destruction of copies of the affidavits or of photographs of the alleged forgery which had been taken by the parties. In 1918 the present plaintiff applied to the Law Society for admission as a solicitor, and the firm lodged an objection against his admission and exhibited a photograph of the alleged forgery and copies of the affidavits that had been taken off the file. Thereupon he commenced the present action against the firm, claiming an injunction to restrain them from using any copy or photograph of the documents that had been destroyed, and moved for an interlocutory order:—

Held (by Neville J. and the Court of Appeal), that it was not an implied term of the settlement embodied in the order that no use whatever was to be made in future of any copy of the documents destroyed.

Held, also, that there was no breach of good faith in the use which the defendants had made of the copies of the documents in question.

MOTION.

In January, 1912, C. H. Jones entered the employ of Trinder, Capron & Co., a firm of solicitors, as an assistant managing clerk on the terms of an agreement contained in a letter dated December 13, 1911, and signed on behalf of the firm by Mr. F. H. Capron, a member of the firm. The agreement was terminable on a three months' notice on either side, and the agreement contained a restrictive clause that C. H. Jones would not for a period of ten years after leaving the firm's employment act either directly or indirectly

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for any person or company who might have been a client of the firm prior to his leaving their employ, and that he would not disclose to any one any of the various matters or things, whether relating to the firm or to any of their clients, that might come to his knowledge in the course of business whilst he was in their employ.

In March, 1915, C. H. Jones left the service of Trinder, Capron & Co., having given them a previous three months' notice, and having entered into articles of clerkship with a Mr. Winn-Jones, a solicitor.

In February, 1915, Trinder, Capron & Co. commenced the action of *Trinder, Capron & Co.* v. *Jones* [1916 T. 194] on the ground that C. H. Jones was acting in breach of the restrictive clause in the letter of December 13, 1911, and claiming an injunction to restrain him from so doing, and moved for an interlocutory order. C. H. Jones exhibited to his affidavit in opposition to the motion the letter of December 13, 1911, with a material alteration of the restrictive clause in his favour purporting to be initialled on behalf of the firm, which alteration and initialling he alleged was made by Mr. F. H. Capron, a member of the firm, at the time he entered their employ in January, 1912. The firm, in their affidavits in reply, asserted that the alteration and initialling of the restrictive clause were a forgery. No order was made on the motion, but the letter of December 13, 1911, showing the alleged forgery, was deposited in Court with liberty to either party to take photographs of it.

In July, 1916, the action of *Trinder, Capron & Co.* v. *Jones* came on for trial and was eventually settled on terms embodied in the following judgment, dated July 28, 1916: "This action coming on for trial this day, &c., and the defendant by his counsel undertaking (1.) for a period of ten years from March 27, 1915, not to act either directly or indirectly (i.e. either as a solicitor or as a clerk or as an assistant to a solicitor) for any person, firm or company who was a client of the plaintiffs during the defendant's employment by the plaintiffs (including all persons, firms or companies who during such employment were members of the Federated Merchant Freighters, Absolutely Limited). (2.) For the like period not to communicate directly or indirectly by letter or otherwise with any such clients (inclusive as aforesaid). (3.) Not to disclose to any one any matter or thing whether relating to the plaintiffs or any of their clients which came to the defendant's knowledge whilst in their employ.

(4.) Not for a period of five years from February 24, 1916, to act as a solicitor or as a clerk or as an assistant to a solicitor or to transact or assist in transacting any legal business whatsoever within a radius of fifty miles from the Mansion House in the city of London. (5.) To return to the plaintiffs their letter to him dated March 30, 1915, and to make no use of it or any copy of it. And the plaintiffs and the defendant by their counsel consenting to this judgment: This Court doth order that the affidavits mentioned in the schedule hereto be taken off the file and it is ordered that the letter dated December 13, 1911, being exhibit C. H. J. 1. to the affidavit of the defendant filed March 24, 1916, be delivered out of Court to the plaintiffs and the solicitors for the defendant for destruction. And it is ordered that the defendant do pay to the plaintiffs their costs of this action to be taxed, &c."

In pursuance of this judgment the letter of December 13, 1911, was destroyed and the affidavits mentioned in the schedule were taken off the file and automatically destroyed in the Record Office. In the negotiations for this settlement Trinder, Capron & Co. absolutely refused to withdraw their charge of forgery, and the judgment was taken on that footing, nothing being said about any copies of the documents to be destroyed.

In February, 1918, C. H. Jones completed his articles with Mr. Winn-Jones, passed his legal examinations, and applied to the Incorporated Law Society for admission as a solicitor, but Trinder, Capron & Co. lodged an objection against his admission under the Solicitors Act, 1888, and made exhibits of a photograph of the letter of December 13, 1911, showing the alleged forgery (which photograph they had taken between the hearing of the motion and of the trial in their action against Jones), and copies of the affidavits that had been destroyed. Thereupon C. H. Jones commenced the present action against Trinder, Capron & Co., claiming an injunction to restrain them from using or making use for any purpose of any copy or photograph of or extracts from the letter of December 13, 1911, and the affidavits that had been taken off the file and that had been destroyed, and now moved for an interlocutory order.

Mr. F. H. Capron, in his affidavit in opposition to the motion, stated that the affidavits taken off the file and the letter were destroyed solely for the purpose of preventing their being accessible

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to the public and to that extent protecting and benefiting C. H. Jones, and further deposed that his firm had no intention of using the documents in question for any other purpose than that of supporting their objection to the admission of C. H. Jones as a solicitor.

The motion was heard before Neville J. on March 27, 1918.

Douglas Hogg, K.C., and *H. S. Preston*, for the motion. The defendants have committed a breach of the implied terms of the settlement effected by the order of July 28, 1916. There was a bona fide and serious dispute as to the authenticity of the alteration and initials in the letter of December 13, 1911, and it was an implied condition of the settlement that the dispute as to the document should be treated as dead and buried and got rid of once for all: *The Moorcock.* (1) If photographs and copies of the documents to be destroyed were to be kept and produced whenever the defendants thought fit, the settlement was meaningless and of no efficacy for the plaintiff. There is no authority on the point. It is a breach of faith on the part of the defendants not to have disclosed the existence of the copies at the time of the settlement and to use them now for their present purpose. The question is not whether or not the letter was altered, but what was the intention of the parties as business men in making the settlement. It is submitted that the necessary inference is that the documents and any copies should be wiped out altogether and not used by either party afterwards, otherwise there was no advantage whatever to Jones, who had no suspicion at the time that copies had been taken. The non-disclosure of the existence of the copies might entitle him to set aside the settlement.

Jenkins, K.C., and *Dighton Pollock*, for the defendants, were not called upon.

NEVILLE J. The plaintiff's action is to restrain the defendants from using copies of certain documents in contravention, as he alleges, of a judgment of the Court which was made by agreement between the parties on July 28, 1916. The action in which the judgment was made was an action by the present defendants against

(1) (1889) 14 P. D. 64.

the present plaintiff, and it arose out of the employment of the plaintiff by the defendants as a solicitor's clerk. Terms had been arranged between them, under which certain restrictions were imposed upon the clerk with regard to the work he did for others. When the action came on for trial it was settled upon terms which are clearly set out in the judgment itself. A very serious charge had been made against the present plaintiff, which he was settling without the withdrawal of the allegations that had been made against him, and upon terms that he was to pay the costs of the action. Consequently one cannot be surprised if in some respects the terms imposed appear onerous; nor would it be unreasonable to suppose that he was not stipulating with the freedom of a man against whom no charge had been made or which he was not inferentially accepting. The order of the Court provides that certain affidavits in which this charge had been made, and replied to, should be taken off the file. Copies of these affidavits are now being used by the present defendants for the purpose of interposing a barrier between the plaintiff and the career which he has chosen and which he could pursue. I am asked to say that that user is inconsistent with the terms of the order of the Court. It seems to me impossible that I can do so. I think that an order taking affidavits off the file for the purpose of destruction has the effect of destroying a public record of certain statements, and I think it goes further and renders those statements no longer privileged. But I do not think that it extends to making it an illegal act to repeat or disseminate copies of the affidavits that have been removed from the file. I know of no case in which anything of the kind has been decided by the Court. I can see very grave objections to reading into the order for removal from the file something which is not expressed in it. The other matter relates to a letter dated December 13, 1911, which was an exhibit to an affidavit which was in Court. It appears that a photograph had been taken by the defendants of that letter, so that very small advantage was obtained by the present plaintiff from the order that the letter of December 13 should be delivered up to be destroyed. It certainly appears to me that, if there was no knowledge or suspicion on his part that any such photograph had been taken or existed, and that information had

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been intentionally withheld from him at the time when the agreement was made which was recorded in the judgment that I am considering, there would have been a good deal to be said for a case that that agreement was obtained by fraud, and arguments might well be directed to the question whether such an agreement could stand, and whether the parties must not be absolved from that agreement and remitted to their original rights. But I find that at all events knowledge that photographs might have been taken was knowledge common to both parties. I also find there is no suggestion in the evidence before me to-day that the existence of the photograph came as a surprise to the plaintiff, or that he did not know that any such document existed. Further than that, this is not an application to set aside the judgment under consideration, nor, indeed, do I suppose that the plaintiff for one moment would desire to set aside that judgment; but I am asked to imply, as a necessary intention of the parties under the circumstances, that the order that the letter should be delivered up to be destroyed carries with it the implied obligation not to communicate the contents of the letter to others, because I see no broad distinction between communication by handing a photograph of the original document and communication by repeating the terms of the original document, and stating the facts in relation to the alteration in the document. It seems to me quite impossible to imply anything further than is expressed in the judgment itself. I think, therefore, the present motion fails, and must be dismissed with costs.

H. L. F.

C. A. The plaintiff appealed. The appeal was heard on April 15, 1918.

H. S. Preston (*Douglas Hogg, K.C.*, with him), for the appellant, substantially repeated the arguments used in the Court below.

Jenkins, K.C., and *Dighton Pollock*, for the respondents, were not called upon to argue.

SWINFEN EADY L.J. This is an appeal by the plaintiff from an order of Neville J. refusing him the relief which he sought by way of interlocutory application.

The plaintiff, Charles Henry Jones, has been articled and is now applying to be admitted a solicitor. One of the defendants, Mr. Frederick Hugh Capron, a member of the firm of Trinder, Capron & Co., has made an affidavit of certain facts for the information of the Law Society, and, I apprehend, of the Master of the Rolls, before whom Mr. Jones' application to be admitted a solicitor will come, and by whom it has to be dealt with. Under s. 10 of the Solicitors Act, 1888, it is provided that "A person who has obtained from the Society a certificate of having passed a final examination" —Mr. Jones, the plaintiff, has passed a final examination, and so comes within that description—"may apply to the Master of the Rolls to be admitted as a solicitor"—that is to the Master of the Rolls personally as such—"and thereupon the Master of the Rolls, unless cause to the contrary is shown to his satisfaction, shall by writing under his hand admit, in such manner and form as he shall from time to time direct, such person to be a solicitor." By this statute the matter is committed to the Master of the Rolls to determine whether an applicant shall or shall not be admitted a solicitor, and the Master of the Rolls is bound to admit a properly qualified applicant as a solicitor unless "cause to the contrary is shown to his satisfaction." For the information, therefore, of the Master of the Rolls, by whom Mr. Jones' application must be dealt with, there is an affidavit of certain facts within the knowledge of the deponent, Mr. Capron, and there are with it copies of certain affidavits, and a photographic copy of a certain letter.

The plaintiff complains of such conduct, and asks this Court to determine that, having regard to an order made on July 28, 1916, in litigation between Messrs. Trinder, Capron & Co. and himself and to the terms of that order, Mr. Capron and his firm were not justified in making use of the documents or of the information, or in supplying the particulars to the Law Society, or in making an affidavit to be used before the Master of the Rolls, and he asks for an injunction to restrain the defendants from making use for any purpose whatever of the document and affidavits. That is the form in which the injunction is asked. Mr. Preston, in argument, has not based his case so high as that. He concedes that for certain purposes the affidavits and the letter may be used, and, although that is the form of the injunction asked for by his notice, at the

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Bar he only seeks to have the user of the affidavits and the letter restrained for the purpose of Jones' pending application to be admitted a solicitor. That is the only purpose for which it is contemplated that these documents are to be used. The writ in the action also asks for a declaration that the defendants, Trinder, Capron & Co., having committed a breach of the obligation imposed upon them by the order made in the action and the agreement not to make use of the documents must be taken to have repudiated the agreement, and it asks for a declaration that the plaintiff is accordingly no longer bound by the agreement; but such relief has not been asked for on this motion. This is only an appeal from the refusal of the judge to grant an injunction on an interlocutory application. The plaintiff further says that in any case there is a matter to be tried, and that the Court ought, having regard to the facts that are proved, to grant an interlocutory injunction restraining any such user until the trial of the action.

The facts leading up to this may be very shortly stated. [His Lordship stated the facts, and continued :] Now it will be observed that the order first directs the affidavits mentioned in the schedule to be taken off the file. Then it follows, according to the practice of the Court, that those affidavits are destroyed—that is to say, the affidavits, being taken off the file, are not returned to the party who files them, but they are destroyed by the officer of the Court. Office copies of the affidavits had in the meantime been taken, and the office copy is recalled and marked "cancelled as such"; that is to say, it is no longer to be regarded as an office copy of an affidavit because the original affidavit is no longer on the file, indeed, no longer in existence; but there is no order that all office or other copies of the affidavits were to be destroyed. And so with regard to the letter. The original letter is to be delivered out of Court for destruction, but there is no order at all with regard to the destruction of the photographic copies which had been taken by both parties, or of any other copies. The position, therefore, is that the original letter and the original affidavits are destroyed: the affidavits having been taken off the file are destroyed; but there is no order for destruction, or no order relating to any user that may be made of either copies of the affidavits or copies of the letter.

Under those circumstances the plaintiff, Jones, says, first, that

it must be treated as an implied term of the agreement embodied in the order of the Court that no use was to be made of the copies of the affidavits or the copies of the letter; but at the Bar the case is not put so high as that. It is conceded that there is nothing to prevent, at all events, some user being made of the affidavits and the letter, and Mr. Preston, who has said all that can be said on behalf of the plaintiff, Jones, and has put the facts very fully before us, has urged that the purposes for which these copies of the affidavits and the copy of the letter may be properly used by Trinder, Capron & Co. are limited to, first, purposes of public justice, and, secondly, for the protection of the character of Trinder, Capron & Co., if assailed; that is to say, in the latter case they may use them as a weapon of defence, but not as a weapon of offence. Further, he still says that, if there is no such term to be implied as a term of the agreement, it was a breach of faith for Messrs. Trinder, Capron & Co. to use the documents for supplying information to the Law Society for the purpose of its being laid before the Master of the Rolls.

Now it will be observed that a very serious charge against the defendant was made in the action. The plaintiffs, Messrs. Trinder, Capron & Co., were applied to and were pressed to withdraw the charge, but they declined to do so; nevertheless the defendant was willing to settle, and did settle, the action upon the terms I have mentioned.

What room is there for implying any term that no use was to be made whatever in the future of any copy of the affidavits or of the letter? The plaintiffs by refusing to withdraw the charge showed that they were insisting upon the truth of it. They accepted the defendant's settlement of the action, but there was nothing whatever to bind the plaintiffs to withdraw the charge, and no admission that the charge was unfounded or in any way inaccurate. They simply declined to withdraw it, of which conduct the defendant had notice.

I am of opinion that the whole bargain between the parties must be treated as expressed in the order of the Court, and that there was no implied term in the agreement that no use except for the limited purpose was to be made of any copy of the affidavits or of the letter.

Again, I can see no breach of faith in the user which Messrs. Trinder, Capron & Co. have made of the documents. They are

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solicitors and, as such, officers of the Court, and, in accordance with what they have conceived to be their duty, upon the application of Jones to be admitted a solicitor, an application which has come to their knowledge and of which they were fully cognizant, they have communicated to the Law Society with the view of laying before the Master of the Rolls such facts as they say are within their knowledge, and which are contained in their affidavits, in order that the Master of the Rolls may have those facts before him in exercising his judgment as to whether Jones should or should not be admitted a solicitor.

In my opinion there is nothing in the order which either expressly or by any fair inference precludes them from taking that course which as honourable members of an honourable profession they have deemed it their duty to take. It is the practice of the Court when occasion arises to order not only the destruction of an original document but of all copies and extracts from it, and also there are many instances in which the Court goes further and restrains parties from communicating in any way the contents of the document. In proper cases orders to that effect have been, can be, and will be made. There is no order to that effect here. The only order is to destroy the original letter and to take the affidavits off the file.

Mr. Preston has urged that if any use whatever is to be made of any copy of the affidavits or of the letter, what was the advantage of taking the affidavits off the file, or of destroying the original letter ? It is quite clear that difficulties are thereby placed in the way of any one else obtaining either copies of the affidavits or of the letter, or any information contained in the affidavits or letter. They are no longer accessible as of course to parties applying.

In my judgment the plaintiff fails to make out on the present application any title even to interim relief, and I agree with the view which the learned judge below took that the plaintiff's motion for an injunction fails. In my opinion the appeal should be dismissed.

BANKES L.J. I agree, and I only wish to add a very few observations from rather a different point of view.

It seems to me that Neville J. was perfectly right in refusing to

make any order for an interlocutory injunction upon the facts as they were presented to him, and it is not necessary for me to go through the earlier history of the case, but only to take up the story at the point where Mr. Jones, having passed his final examination, makes an application to be admitted as a solicitor. Thereupon Messrs. Trinder, Capron & Co. show cause, as they were entitled to do. I say nothing to prejudice further discussion as to the effect of the order, but the Solicitors Act, 1888, contemplates that persons may show cause if they think a proper occasion arises for so doing. On February 28 Messrs. Trinder, Capron & Co. write to Mr. Jones enclosing a copy of the notice of objection to the admission, "which we have sent to the registrar, with copies of the affidavits and exhibits."

Now what was the position of Mr. Jones under those circumstances? Cause was shown against his being admitted, and it seems to me, though I am not familiar with the practice, that it is impossible to suppose that Mr. Jones would not have had a right to apply for an opportunity of being heard in opposition to the case that was made against him by Messrs. Trinder, Capron & Co. In other words, he has the opportunity, the second opportunity, of challenging the correctness of Messrs. Trinder, Capron & Co.'s view as to his conduct in reference to the alteration of the letter. He does not do that, but takes time for consideration, and after the lapse of a fortnight or so he launches this motion on March 13, the mischief having been done; and asks by his action for an injunction, not setting aside or recalling anything that Messrs. Trinder, Capron & Co. have done, but that until the trial of the action or further order they shall be restrained from using or making use for any purpose of any copies, photographs, or extracts. There was no reason to suppose that they intended to make any other use of these documents than the one they had already made. What Mr. Jones was complaining of was the use they had already made of the documents, and so far as that might possibly do him any harm he had the opportunity of going and stating his view and convincing the Master of the Rolls, if he could, that he was an innocent man. In those circumstances it seems to me hopeless to ask the Court to interfere, by interlocutory injunction, to prevent something which has already been done.

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Upon those grounds, without saying a word as to whether or not there is any possibility of success upon the other branch of the action, which seems to me to raise a question of much more importance to Mr. Jones, if he could establish it, namely, that the defendants, having committed a breach of the obligation imposed upon them, have repudiated the agreement and freed him from his undertaking—without saying anything upon that as part of my judgment, although possibly I may have by some interlocutory observations shown that I have formed an opinion—it seems to me that the application must fail.

Appeal dismissed.

Solicitors: *W. & W. Stocken; Trinder, Capron & Co.*

W. I. C.

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[1917 B. 2597.]

WEBSTER *v.* SAME COMPANY.

[1917 W. 2096.]

SOLLAS *v.* SAME COMPANY.

[1917 S. 2532.]

KERSEY & CO. *v.* SAME COMPANY.

[1917 K. 686.]

OAKLEY, SOLLAS & CO. *v.* SAME COMPANY.

[1917 O. 868.]

Landlord and Tenant—Letting of Set of Offices in one Building—Agreement by Landlord to provide Housekeeper—Obligation as to providing Resident Housekeeper—Agreement running with Reversion—Remedy for Breach of Agreement—Specific Performance—Damages—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 11.

G.'s trustees, the owners in fee of a large building entirely let out in sets of rooms for use as offices (except one set occupied by their resident housekeeper), let out (under an agreement in writing but not under seal) one set of rooms to B. & Co. at a yearly rent,

and an additional and smaller rent for "cleaning the rooms by the housekeeper appointed for the time being by the landlord." By a similar agreement other rooms were let by G.'s trustees to W. A third letting by G.'s trustees of another set of rooms was to S., in which case the additional rent was for "cleaning the premises by the housekeeper," the words "appointed by the landlords" being omitted. G.'s trustees sold and conveyed the building to the defendant company subject to the tenancies, and the company by a similar agreement let another set of rooms to K. & Co., and the company thereby agreed "to appoint and pay a housekeeper to be in attendance between the hours of 8 A.M. and 10 P.M. of each weekday, who shall act as the servant of the lessees in cleaning the rooms (windows and skylights excepted), being appointed for that purpose in charge thereof by the lessees. Such appointment shall not constitute any responsibility on the lessors' part for the act or deficiency of such housekeeper, or of any one in his or her employment, or anything arising therefrom, but the lessors will remove such housekeeper and substitute another if called upon to do so by at least two-thirds of the tenants," who negatively agreed not to require the premises to be open before 8 A.M. or after 10 P.M. or to require access on Sundays. The company let other rooms to O. & Co. by two agreements containing similar terms except that their second agreement did not include any agreement that the housekeeper should attend between 8 A.M. and 10 P.M. After all the tenancies had continued for some time the resident housekeeper, without any notice to the tenants, left the building, which was placed in charge of a housekeeper who resided on the top floor of another building, about sixty yards away from door to door, and had charge also of the building in which he resided and a third building. This housekeeper attended at the tenants' house at irregular and short times between 7 A.M. and 8.30 P.M. and had a final look round later on, and if in his absences the tenants wished to see him they had to seek him in one or both of the other buildings in his charge:—

Held—(1.) that, if it was necessary to decide the question, there seemed to be a correlative obligation, implied on the part of the landlords, as to supplying the services of a housekeeper corresponding with the tenants' obligation to pay the additional rents for those services; (2.) that the landlords' obligation as to the housekeeper was one "with reference to the subject-matter of the lease" within the meaning of s. 11 of the Conveyancing Act, 1881 (which had not altered the law), and would therefore bind the reversionary interest, at any rate if the agreements were under seal; but that it was unnecessary to decide whether the want of a seal prevented that result, inasmuch as (3.) in the case of the tenancies granted by G.'s trustees no obligation on the landlords' part could be implied except that the cleaning should be done by some person in charge of the property, and certainly no obligation to provide a resident housekeeper, and, therefore, that there had been no

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breach of the agreements made by G.'s trustees; (4.) that under the three tenancy agreements granted by the company there was no obligation on it to provide a resident housekeeper, but that there had been a breach of the two agreements containing the obligation to provide the housekeeper's attendance between 8 A.M. and 10 P.M.; and (5.) that the remedy of K. & Co. and O. & Co. for the breach was in damages and not by specific performance.

By an agreement in writing (but not under seal) dated December 30, 1893, Laura Gilby and others (the trustees of one Gilby and owners of a block of buildings used as offices, being 52, Gracechurch Street, London, E.C.) agreed to let to the persons constituting the firm of Barnes, Dunn & Boughton, who agreed to take, three rooms or offices on the second floor of 52, Gracechurch Street, "from March 25, 1894, on a yearly tenancy, at a yearly rent of 115*l.*, and a further sum of 15*l.* 12*s.* per annum as additional rent for cleaning the said rooms by the housekeeper appointed for the time being by the landlords." The agreement contained no express covenant by the landlords for quiet enjoyment by the tenants.

By another agreement in writing (but not under seal) dated November 11, 1904, the trustees of Gilby agreed to let to the members of the same firm, and they agreed to take, two rooms or offices on the third floor of 52, Gracechurch Street, "from March 25, 1904, on a yearly tenancy, at a yearly rent of 52*l.* 10*s.*, and a further sum of 10*l.* 8*s.* per annum, as additional rent for cleaning the said rooms by the housekeeper appointed for the time being by the landlords." There was no express agreement by the landlords for quiet enjoyment by the tenants.

By an indenture of lease dated September 7, 1906, and made between Gilby's trustees (the lessors) of the one part and Alfred Ernest Webster (the lessee) of the other part, in consideration of the rents thereinafter reserved and the lessee's covenants thereinafter contained, the lessors demised unto the lessee three rooms or offices on the third floor of 52, Gracechurch Street, for twenty-one years from September 29, 1906 (terminable by the lessee at the end of seven or fourteen years), yielding and paying therefor in advance certain rents increasing as the residue of the term decreased, "And also yielding and paying during every year of the said term the further yearly sum of 15*l.* 12*s.* as additional rent for the cleaning and dusting of the said rooms or offices by the housekeeper appointed

for the time being by the lessors, but such cleaning and dusting is not to include chimney sweeping or window cleaning." The rents were payable quarterly in advance. The lessee covenanted to pay "the said several rents" free from all deduction, to keep the premises in repair, and not to use or permit to be used the demised premises for any other purpose than as counting houses or offices, and not as a shop or warehouse, or for retail trade, or as sleeping apartments, and that he would "conform to the regulations from time to time made by the lessors, their heirs or assigns, as to the outer gate or entrance to the said messuage, which gate is closed from eight o'clock at night to eight o'clock in the morning, but, subject as aforesaid, no such regulation shall be inconsistent with the beneficial occupation of the premises." The only covenant by the lessors was that "the lessee, his executors, administrators and assigns, paying the rents hereinbefore reserved and observing the covenants by the lessee herein contained may peaceably hold and enjoy the premises during the said term without any interruption by the lessors, their heirs or assigns, or any person lawfully claiming through them, freed and discharged from the payment of all rates, charges, and assessments whatsoever which now are or shall during the said term be charged assessed or imposed upon or in respect of the said demised premises, except gas rate or rent."

By an indenture of lease dated March 2, 1907, and made between Alfred Gilby and others (the lessors) of the one part, and Ernest Henry Sollas (the lessee) of the other part, in consideration of the rent thereinafter reserved and the lessee's covenants thereinafter contained, the lessors demised to the lessee three rooms or offices on the ground floor of 52, Gracechurch Street, for the term of twenty-one years from March 25, 1907 (terminable at the end of seven or fourteen years), yielding and paying a yearly rent of 160*l.*, payable quarterly, "And also yielding and paying during the said term, on Monday in every week, the additional weekly rent of 6*s.* for cleaning the said premises by the housekeeper." Sollas covenanted to pay "the said several rents," not to use or permit the premises to be used for any of the purposes forbidden in Webster's lease, and to conform to the regulations, as covenanted in that lease. The only covenant by the lessors was a similar covenant for quiet enjoyment.

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In 1909 the ownership of 52, Gracechurch Street became vested in the City of London Real Property Company, Limited (hereinafter called "the company"), to which Frederick Barnes and Reginald Ambrose Boughton, the members of the firm, and also Webster and Sollas, paid the rents and additional rents paid up to that time to Gilby's trustees.

In 1909 the firm wrote to the company complaining that the resident housekeeper at 52, Gracechurch Street, had been removed; but another resident housekeeper was appointed, and a claim based on the correspondence between the firm and the company failed at the trial.

By an agreement in writing under seal, dated May 5, 1911, and made between the company (the lessors) of the one part, and W. R. Kersey, W. F. Knight, F. W. Brazil and A. V. Knight, solicitors carrying on business as Sandom, Kersey & Knight (the lessees), of the other part, "the lessors, being the holders of the premises 52, Gracechurch Street," agreed to let to the lessees, and the lessees agreed to take, "the two rooms, now in the occupation of the lessees, on the first floor and the five rooms, also now in the occupation of the lessees, on the second floor, for the term of a yearly tenancy from March 25, 1911." The lessees agreed to pay to the lessors "rent quarterly on the usual quarter days (the last quarter's rent to be paid in advance) at the rate of 310*l.* per annum, also 36*l.* 8*s.* per annum for the services of the housekeeper and eighteenpence per day for each fire lighted in their rooms and 1*l.* annually for lighting the public parts of the house. Such payments for the services of the housekeeper, fuel and lighting to be payable and recoverable in the same manner as rent." The lessees agreed (inter alia) not to do or suffer to be done anything which "might render the said premises or the house wherein they are situated liable to be assessed as a dwelling-house" or "to require the premises to be open before 8 A.M. or after 10 P.M. or to require access on Sundays." The agreement also contained the following clause: "The lessors undertake to give the lessees quiet enjoyment from any person claiming by under or through the lessors; to pay rates and taxes; to appoint and pay a housekeeper to be in attendance between the hours of 8 A.M. and 10 P.M. of each weekday, who shall act as the servant of the lessees in cleaning the

rooms (windows and skylights excepted), being appointed for that purpose in charge thereof by the lessees. Such appointment shall not constitute any responsibility on the lessors' part for the act or deficiency of such housekeeper or of any one in his or her employment, or anything arising therefrom, but the lessors will remove such housekeeper and substitute another if called upon to do so by at least two thirds of the tenants."

By an agreement in writing (but not under seal) dated November 5, 1915, the company (the lessors) agreed to grant to Oakley, Sollas & Co., Limited (the lessees), and the lessees agreed to take, a lease of three rooms on the ground floor of 52, Gracechurch Street, for three years from September 29, 1915, and on a yearly tenancy thereafter; and the lessees agreed to pay to the lessors "rent quarterly on the usual quarter days at the rate of 160*l.* per annum, also 6*s.* per week for the services of the housekeeper, and 8*d.* per day for each fire lighted in their rooms, and 3*l.* annually for lighting the public parts of the house. The lessees also agreed not to do or suffer to be done anything which might render "the said premises or the house wherein they are situated liable to be assessed as a dwelling-house." The lease contained an undertaking by the company in the same terms as those of the undertaking in the agreement with Sandom, Kersey & Knight, the housekeeper, as in that case, "to be in attendance between the hours of 8 A.M. and 10 P.M. of each weekday."

By another written agreement of June 26, 1917, the company agreed to grant a lease for seven years of three rooms on the first floor to Oakley, Sollas & Co., Limited, who agreed to pay therefor a yearly rent at the rate of 160*l.* and "also 6*s.* per week for the services of the housekeeper" and a charge for heating and lighting. The lessees covenanted not to do or suffer anything to be done which might render the premises or the house wherein they were situated liable to be assessed as a dwelling-house, and not to require the premises to be open before 8 A.M. or after 10 P.M. and not to require access on Sundays. The agreement also contained an undertaking by the company similar to that in its first agreement with Oakley, Sollas & Co., Limited (except that the provision that the housekeeper should be in attendance between 8 A.M. and 10 P.M. was omitted), and a similar covenant for quiet enjoyment.

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In November, 1917, the resident housekeeper at 52, Gracechurch Street was removed and the company did not appoint another resident housekeeper, but gave the keys of that building to the care of one Henley, the company's resident housekeeper at 57, Gracechurch Street, about sixty yards away, who also looked after a third building belonging to the company. Henley's attendance is more fully described in his Lordship's judgment.

An action was then commenced by Frederick Barnes and Reginald Ambrose Boughton, carrying on business as Barnes, Dunn & Boughton, against the company. By their statement of claim the plaintiffs alleged that a covenant for quiet enjoyment was implied in the two tenancy agreements, and the following allegations were also made in the same pleading: "The plaintiffs are put to serious inconvenience by the aforesaid removal of the housekeeper from 52, Gracechurch Street. In consequence of such removal there is nobody to receive the letters addressed to the plaintiffs at their said offices, but the same are, by the direction of the defendants, left with their housekeeper at 57, Gracechurch Street, and the delivery thereof to the plaintiffs is thereby delayed. There is nobody to unlock the outer gate or entrance door to the said building for the admission of the plaintiffs to their said offices or to give the plaintiffs the keys of their offices upon their arrival in the morning, or to receive such keys when the plaintiffs lock up their offices on their departure in the evening, or to prevent persons with dishonest or improper motives from obtaining access to the said offices, or to give immediate warning in the event of a fire occurring in any part of the said building. The residence and constant attendance of a housekeeper in a building of the size and character of 52, Gracechurch Street are necessary for the proper protection of the offices therein and of the contents of such offices, and such housekeepers are always or almost always employed by the landlords of similar buildings in the city of London. The tenancy agreements under which the plaintiffs hold their said offices contain covenants by the tenants that the same shall not be used as sleeping or dwelling rooms, and it was an implied term of the said agreements and tenancies that a housekeeper should reside upon the premises, and that he or his wife, or some other duly qualified person, should be in constant attendance in the said building and should not be

removed therefrom. . . . . Such removal was a breach by the defendants of the said implied covenants for quiet enjoyment, and a derogation by them from the grant of their said predecessors in title and a breach of the undertaking given in the said letter of October 11, 1909." The plaintiffs claimed "(1.) A declaration that they are entitled to have a housekeeper resident in the said building and in constant attendance upon the premises. (2.) That the defendants may be ordered to appoint a housekeeper who shall reside in the said building and who shall, either personally or by his wife or other qualified person, be constantly in attendance there. (3.) An injunction to restrain the defendants (*a*) from leaving the said building without the protection of such a housekeeper, and (*b*) from letting or disposing of the rooms required for his residence. (4.) Damages. (5.) Costs."

By their defence the company said that owing to the war it had been increasingly difficult, and ultimately impossible, to find housekeepers, and more particularly resident housekeepers, for the company's blocks of buildings in the city of London, and that in consequence it had been necessary to group two or more blocks under one housekeeper; that the distance between the entrance doors of 52 and 57, Gracechurch Street was about fifty-seven yards; that there was no implied covenant for quiet enjoyment; that the removal of the resident housekeeper was not improper; and that the housekeeper of 57, Gracechurch Street was in attendance at all material times at 52, Gracechurch Street. The company also denied that the plaintiffs had been inconvenienced by the removal of the housekeeper, and made allegations minimizing the acts alleged by the plaintiffs to cause inconvenience. The company also said that neither the residence nor the constant attendance of a housekeeper in a building of the size and character of 52, Gracechurch Street was necessary for the proper protection of the offices therein or the contents thereof, and that resident housekeepers were not usually employed by landlords of similar buildings in the city of London unless they were much larger than 52, Gracechurch Street. The company also denied that it was an implied term of either agreement that the housekeeper should reside on the premises, or that he and his wife, or either of them, or some other qualified person should be in constant attendance in 52,

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Gracechurch Street, and should not be removed therefrom, but said that if there were any such implied terms, the burden thereof did not run with the land so as to bind the company as owners of 52, Gracechurch Street or otherwise. The company also denied that the removal of the housekeeper was a breach of any covenant for quiet enjoyment or undertaking or any derogation from the grant of the predecessors in title. The company also denied that there was any such grant as alleged, and that if there was any such grant, the company were bona fide purchasers for value having the legal estate of 52, Gracechurch Street, without notice of such grant or of any other right, title, or claim of the plaintiffs otherwise than as expressed by the two agreements. The company also denied that the plaintiffs had suffered or would suffer any damage.

Similar actions were brought by Webster, Sollas, Kersey & Co. and Oakley, Sollas & Co., and all the five actions were tried together.

Romer, K.C., and *Percy Wheeler*, for the plaintiffs. Where an additional rent is payable for the "cleaning" by a housekeeper a correlative obligation must be implied to keep a housekeeper on the premises: *The Moorcock* (1); Halsbury's Laws of England, vol. vii. pp. 512 to 514, and instances given in notes (*c*) and (*d*) on pp. 513, 514; *Earl of Shrewsbury* v. *Gould* (2); *Webb* v. *Plummer*. (3) If A. agrees to sell to B. there is an implied agreement by B. to purchase. [They also referred to *Rhodes* v. *Bullard* (4); *M'Intyre* v. *Belcher* (5); *Randall* v. *Lynch*. (6)]

[SARGANT J. referred to *Hamlyn & Co.* v. *Wood & Co.* (7); Norton on Deeds, p. 492, and *Iven* v. *Elwes*. (8)]

We do not claim specific performance of the covenant to the extent that the housekeeper, when appointed, shall be compelled to perform his duties, but only claim specific performance of the agreement to appoint and supply a housekeeper. In *Ryan* v. *Mutual Tontine Westminster Chambers Association* (9) the contract was not divisible into two parts, one to appoint a porter and the

(1) (1889) 14 P. D. 64, 68.
(2) (1819) 2 B. & Al. 487.
(3) (1819) 2 B. & Al. 746.
(4) (1806) 7 East, 116.
(5) (1863) 14 C. B. (N.S.) 654.
(6) (1810) 12 East, 179.
(7) [1891] 2 Q. B. 488.
(8) (1854) 3 Drew. 25, 34.
(9) [1893] 1 Ch. 116.

other that he should perform certain specified duties. But in Kersey's case the contract is to appoint and employ a housekeeper. The plaintiffs are entitled to an injunction to restrain the defendants from letting the rooms occupied by the housekeeper: *Keith, Prowse & Co.* v. *National Telephone Co.* (1) In Barnes' case a covenant for quiet enjoyment is to be implied from the relationship of landlord and tenant. The subject demised is a set of rooms with a resident housekeeper. To deprive the lessees of the resident housekeeper constitutes a breach of covenant for quiet enjoyment: *Budd-Scott* v. *Daniell.* (2)

A. Grant, K.C., and *P. F. S. Stokes*, for the defendants. In the cases of Kersey and Sollas there are mutual contracts, and the contracts are not severable. An injunction to restrain a breach of the covenant to appoint a housekeeper would involve the performance by the housekeeper of detailed duties which the Court would not supervise; and therefore no case is made for specific performance. Where the covenant is express to pay rent for the cleaning by a housekeeper a covenant will not be implied from it that a housekeeper shall be resident on the premises: Norton on Deeds, p. 500; and it is only where the deed would be inoperative that a covenant will be implied: Norton on Deeds, p. 492; *James* v. *Cochrane* (3); *Hamlyn & Co.* v. *Wood & Co.* (4) It is only when the failure to imply a term goes to the root of the transaction, so that there is a failure of consideration, that a covenant will be implied: *Rhodes* v. *Forwood* (5); *In re Railway and Electric Appliances Co.* (6) In the cases cited for the plaintiffs a covenant was implied from express words in other covenants: see instances collected in Woodfall's Landlord and Tenant, 19th ed. p. 208; Norton on Deeds, pp. 486, 487. They are cases of construction. Taking Webster's case as a typical one, there is no express covenant to appoint a housekeeper, and one is not implied.

As regards the tenancies created by Gilby's trustees, the benefit of the stipulation did not pass with the land to the plaintiffs; the statute 32 Hen. 8, c. 34, only applied to leases under seal:

(1) [1894] 2 Ch. 147.
(2) [1902] 2 K. B. 351.
(3) (1852) 7 Ex. 170; (1853) 8 Ex. 556.
(4) [1891] 2 Q. B. 488.
(5) (1876) 1 App. Cas. 256.
(6) (1888) 38 Ch. D. 597.

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Standen v. *Christmas* (1); *Elliott* v. *Johnson*. (2) Sect. 11 of the Conveyancing Act, 1881, has not extended the law. The covenant has no reference to or does not touch or concern the land demised; it is collateral to it: Woodfall's Landlord and Tenant, 19th ed. p. 189; Foa on Landlord and Tenant, 5th ed. pp. 408 et seq.; *Spencer's Case* (3); *Congleton Corporation* v. *Pattison* (4); *Woodall* v. *Clifton*. (5)

There has been no breach in fact. There is no covenant to keep a resident housekeeper, but only a covenant to clean or to clean and dust. The Court will not grant an injunction in such a case: *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (6); *Whitwood Chemical Co.* v. *Hardman* (7); *London, Chatham and Dover Ry. Co.* v. *Spiers & Pond, Ld.* (8); *Blackett* v. *Bates*. (9)

Romer, K.C., in reply, cited *Wood* v. *Copper Miners' Co.* (10), *Ogden's, Ld.* v. *Nelson* (11), *Walsh* v. *Lonsdale* (12), *Tatem* v. *Chaplin* (13), and *Clegg* v. *Hands*. (14)

SARGANT J. In this case the five sets of tenants of a building, No. 52, Gracechurch Street, in the city of London, who hold five sets of offices under the City of London Real Property Company, Limited, have come to the Court for substantially similar relief in each case. [His Lordship stated the relief claimed by Messrs. Barnes, Dunn & Boughton, in their statement of claim, and continued:] A substantially similar claim is raised in all the other four actions.

The way in which the property is held is this: Messrs. Barnes & Co. became tenants in December, 1894. They then took three rooms on the second floor on a yearly tenancy from March 25, 1894, and they paid in rent 115*l*., and also 15*l*. 12*s*. "as additional rent for cleaning the said rooms by the housekeeper appointed for the time being by the landlords." In November, 1904, they took two rooms on the third floor. Those rooms, again, were taken

(1) (1847) 10 Q. B. 135.
(2) (1866) L. R. 2 Q. B. 120.
(3) 1 Sm. L. C. 12th ed. 62, 76.
(4) (1808) 10 East, 130.
(5) [1905] 2 Ch. 257.
(6) (1874) L. R. 9 Ch. 331.
(7) [1891] 2 Ch. 416.
(8) (1916) 32 Times L. R. 493.
(9) (1865) L. R. 1 Ch. 117.
(10) (1849) 7 C. B. 906, 936.
(11) [1903] 2 K. B. 287.
(12) (1882) 21 Ch. D. 9.
(13) (1793) 2 H. Bl. 133.
(14) (1890) 44 Ch. D. 503.

yearly from March 25, 1904, on a yearly tenancy, and there again they paid a rent, and an additional rent of 10*l.* 8*s.*, expressed to be for exactly the same services as those mentioned in the first agreement. The next tenant in point of time amongst the plaintiffs was Mr. Webster. He took under a lease which was dated September 7, 1906. Under that lease he took three rooms on the third floor for a term of twenty-one years from September 29, 1906. That is much the longest tenancy. That tenancy was only terminable by the lessee, and was terminable by him at the end of the first seven or the next fourteen years, and it lasts up to the year 1927, which makes his rights under that lease practically of more importance to the defendants than the rights of any of the other lessees. He took at a rent of 84*l.* 8*s.*, with an additional rent of 15*l.* 12*s.*, which is expressed to be an "additional rent for the cleaning and dusting the said rooms or offices" by the housekeeper appointed for the time being by the lessors. In his case there was an exception, from the cleaning which was to be done, of window cleaning and chimney sweeping, and in his case both the rents were expressed to be payable in advance. The next tenant in point of time was Mr. Sollas. He took, under a lease of March 2, 1907, three rooms on the ground floor for twenty-one years from March 25, 1907, and that was terminable at the end of the first seven or fourteen years at the option of either party. His rent was 160*l.*, and he paid a weekly additional rent of 6*s.* on the Monday in every week "for cleaning the premises by the housekeeper." The words "appointed by the lessors" do not appear. That was the last of the three tenancies which were created by Gilby's trustees, the predecessors in title of the defendants.

In the year 1909 the defendants bought the freehold reversion of the property from Gilby's trustees, and took over the tenancies of the existing tenants. Since they have purchased they have let to two additional sets of tenants, Messrs. Kersey & Co. and Oakley, Sollas & Co. Kersey & Co. were in occupation under an agreement with Gilby's trustees at the time when the defendants purchased, but their tenancy expired, and they at present hold, under a yearly tenancy from the defendants from March 25, 1911, two rooms on the first floor and five rooms on the second floor. They pay a rent of 310*l.*, and an additional rent "of 36*l.* 8*s.* per annum for the

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services of the housekeeper," and there is in their agreement an express agreement by the landlords, the present defendants, "to appoint and pay a housekeeper, to be in attendance between the hours of 8 A.M. and 10 P.M. of each weekday, who shall act as the servant of the lessees in cleaning the rooms (windows and skylights excepted), being appointed for that purpose in charge thereof by the lessees. Such appointment shall not constitute any responsibility on the lessors' part for the act or deficiency of such housekeeper, or of any one in his or her employment, or anything arising therefrom, but the lessors will remove such housekeeper and substitute another if called upon to do so by at least two-thirds of the tenants." There is in that agreement a negative agreement by the tenants not "to require the premises to be open before 8 A.M. or after 10 P.M., or to require access on Sundays." The last tenants in point of time are Oakley, Sollas & Co., who in November, 1915, took three rooms on the ground floor for three years from September 29, 1915, and on a yearly tenancy thereafter. They pay the rent of 160*l.* a year, and 6*s.* per week for the services of the housekeeper. There was an agreement by the lessors to appoint and pay a housekeeper in exactly the same terms as the agreement in the case of Kersey & Co. Later, on June 26, 1917, Oakley, Sollas & Co. took three rooms more on the first floor from the defendants for seven years from June 24, 1917, determinable by either party at the end of three years; the rent and the additional rent for the attendance were exactly the same as in the case of their first taking.

The only material difference in the second agreement with Oakley, Sollas & Co. was that the landlords' obligation as to the appointment of a housekeeper to do the cleaning and so on did not include any obligation that the housekeeper should be in attendance between the hours of 8 A.M. and 10 P.M. Probably by that time the landlords were thinking of making some change either in that letting and the other lettings in the house or in the letting of their properties in the city of London generally; for they are landlords of a great many other sets of offices, and it may be that their common form was changed in view of altered circumstances.

These tenants altogether took up all the rooms in No. 52, Grace-

church Street, which has a separate entrance from Gracechurch Street and a separate courtyard, except some rooms in the basement which are let to a Mr. Constan and three rooms on the top floor which have been until recently occupied by a resident housekeeper. A resident housekeeper has, in fact, been in existence on the premises for forty or fifty years past. Originally, that housekeeper had, I think, two rooms on the top floor, but in the year 1909, when the defendants purchased, some structural alterations were made and a third room was added to the rooms occupied by the housekeeper. On November 17, 1917, without any notice to the plaintiffs, the resident housekeeper left, and the property was put in charge of a housekeeper who resides on the top floor of No. 57, Gracechurch Street, a very much larger building. In order to obtain access from No. 57 to No. 52 it is necessary for the housekeeper to come downstairs on to the ground floor, and to go through a courtyard leading from No. 57 into Gracechurch Street, then to go a short distance along Gracechurch Street and then turn in at the entrance to No. 52, Gracechurch Street, and the total distance between the front door of No. 57 and the front door of No. 52 is said to be fifty-seven yards. The present housekeeper at No. 57 has, by his servant or by his wife, charge also not only of 52 and 57, Gracechurch Street, but of another house, No. 2, Talbot Court, which is a rather smaller house than 52, Gracechurch Street.

There are some slight differences, perhaps, with regard to the exact rights of all the various tenants. [His Lordship referred to a claim made in Webster's action that when he took his rooms there had been a certain verbal warranty, which claim was abandoned at the trial, and to a claim made by some of the plaintiffs which was based on certain correspondence in 1909, and which his Lordship held did not amount to an agreement, and continued :]

That being so, the five cases divide themselves, naturally, into two sets—first of all the three sets of tenants who took under the predecessors in title of the defendant company, and secondly the two sets of tenants who took by way of direct agreement with the defendant company. I will consider the two sets of cases separately.

As regards the three sets of tenants taking from Gilby's trustees, the first defence set up is, that there was in the tenancy agree-

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ments nothing to amount to a covenant or agreement by the landlords that they would provide a housekeeper, and that the reservation of rent for that purpose does not import any implied correlative obligation on the part of the landlords to give an equivalent of that for which the rent was reserved. The second defence is, that if such an obligation existed in the case of the original lessors, it was not an obligation touching the land, so as to become binding on the defendant company as the successors in title. The third and fourth defences—I class them together—are that in any case no obligation was created of which there had been a breach—that is to say, that the obligation, if any, was not to employ a resident housekeeper, or a housekeeper who was to be in attendance for a longer period than the attendance that had recently been given by the housekeeper employed by the defendant company. With regard to the first defence, if and so far as it were necessary to decide it, I should certainly feel inclined to come to the conclusion that a correlative obligation was implied by the lessors corresponding with the obligation on the part of the tenants to pay the rent for the particular service. There are many cases in which, where the expression is defective, the Court has nevertheless implied an obligation on the part of the person on whom the obligation was not in terms imposed, for example, the one given in *Wood* v. *Copper Miners' Co.* (1), that if one party agrees to sell to another party, there is a corresponding obligation on the other party to buy. The case which is most commonly referred to is that of *The Moorcock* (2), where it was held that the owner of a wharf who took rent for the lying of vessels to unload at the wharf, although he was not the owner of the ground on which the vessel had to ground for the purpose, was under an obligation or warranty that the ground was reasonably sufficient for the purpose of the vessel grounding there—that it was reasonably flat and adapted for the purpose. But I think this is a much plainer case than that. Mr. Grant in his argument was almost bound to confess that, if there were a reservation of rent in favour of a lessor for the purpose of effecting insurance against fire on the property, there must in that event be an obligation on his part to employ the money paid to him for insurance in effecting the insurance.

(1) 7 C. B. 906, 936. (2) 14 P. D. 64.

And if (which I do not think is the case) it were necessary for me to decide the point, I should, as at present advised, come to the conclusion that there was in these agreements imposed on the lessors an obligation corresponding to the obligation imposed on the lessees to pay them rents for the purpose of a particular service; and that not only could they not take or retain the rent without performing the service, but that they were bound to perform the service. I think that is made, if possible, plainer in one or two of these cases by the fact that there the additional rent was made payable in advance.

Then there comes the question whether the obligation ran with the land. The Conveyancing Act of 1881, s. 11, enacts that the obligation of a covenant entered into by a lessor with reference to "the subject-matter of the lease" shall bind the reversionary interest. Was this an obligation with reference to the subject-matter of the lease? I do not think the law was intended to be altered at all by that enactment as regards the character of the obligation. I think the words of the statute expressed the same idea as that conveyed by the old phrase "touching the land." After considering the various authorities which have been cited, and particularly the case of *Clegg* v. *Hands* (1), I cannot entertain a doubt that this obligation to clean, or to clean and dust by means of the provision of a housekeeper for the purpose, is something with reference to the subject-matter of the lease; certainly it has at least as close reference to the subject-matter of the lease as an obligation not to sell any beer on the property except beer provided by the lessor. In my judgment this is clearly something that touches the subject-matter. It affects the value of the rooms for the purposes for which they were let while in the occupation of the lessees. It seems to me to be a very valuable right of the lessees to have the cleaning and dusting performed by some one who is appointed for the purpose by the landlords for all the tenants. It is far better for them that there should be some central authority who should appoint a housekeeper to look after the house generally than that each of them should be left to make provision of that kind for himself. It would not be possible for any one individual, having to make arrangements

(1) 44 Ch. D. 503.

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of that sort, to ensure that the occupants of the other rooms would be as careful as he might be himself in the selection of a housekeeper; and when once you had five or six different sets of cleaners coming in to perform the services of cleaning and dusting and so on, there would be very much inferior security to the tenants that there should not be all sorts of improper people getting into the house, and perhaps making arrangements for burglary or theft, or acquiring information which it was very desirable should not go outside the particular office. If it were necessary to decide the point I have no doubt that this was a covenant with reference to the subject-matter of the lease. There is beyond that, as regards Messrs. Barnes & Co., a question whether the covenant would enure or whether the agreement would enure to the benefit of the assignees of the reversion, having regard to the fact that the demise to them was not under seal. All I say with regard to that is that that point was expressly left open by the Court of Appeal in *Wedd* v. *Porter* (1), and, as it is not necessary for me to decide for the purpose of my judgment whether these covenants do run with the land, it is not necessary for me to decide whether in this particular case the covenant fails to run because the demise was not under seal.

I now come to the question whether the covenant that I can imply is in such terms that I should hold that the defendants have been guilty of a breach of it. Practically, what the plaintiffs have to show in order to succeed is that the covenant to be implied is not merely a covenant that the cleaning, or the cleaning and dusting as the case may be, shall be done by somebody who is appointed to look after the house for that purpose, but that it shall be done by a housekeeper who shall either be actually a resident housekeeper—that is what the statement of claim says—or at any rate a housekeeper attached to that particular house, or certainly a housekeeper who shall be more in attendance upon the house than Mr. Henley has recently been. I think that is to imply more than can be legitimately got out of the terms of the reservation of additional rent. I take the first agreement, that with Messrs. Barnes & Co., that the additional rent is to be "for cleaning the said rooms by the housekeeper appointed for the time being by the landlords."

(1) [1916] 2 K. B. 91.

I think that may be taken as a fair specimen. I do not think that any real difference is created by the words being "cleaning the said rooms by the housekeeper" and omitting the words "appointed for the time being by the landlords," as in Mr. Sollas's agreement. Now what obligation can be implied out of either of those sets of words? I do not think that any obligation can be implied against the defendants other than an obligation to do the cleaning or the cleaning and dusting by some person who is to be in charge of the property. I think that Mr. Romer's argument unduly italicizes the word "housekeeper." He says it is to be cleaning by a housekeeper —somebody who is there, attached to the particular house. I fail to find any such precise meaning as that in this phrase. The meaning of the term "housekeeper" as appearing in certain dictionaries was referred to; but taking the definition given in the Oxford Dictionary, one of the meanings given there is "a person in charge of a house, office, place of business, &c." And in my judgment, when this additional rent is reserved for cleaning the rooms "by the housekeeper appointed for the time being," although it may be that you can imply that the landlords shall only provide one housekeeper for the purpose of superintending the cleaning of each set of rooms by cleaners—that is to say, you are not to have a divided authority—and the person to superintend the cleaning is to be a housekeeper looking after the cleaning of the rooms by all the different sets of cleaners, I cannot find anything in the phrase which implies that the housekeeper who is to be in charge of the house for that purpose is either to reside in the house or is to be there for any particular hours, at any rate outside the ordinary hours of cleaning, or is to be limited in his or her function to the superintending of the cleaning and looking after that house and no other house or houses in addition. I think that would be reading a very great deal too much into the words and italicizing unduly the words "the housekeeper." This must, I think, always be borne in mind, that when you are going to imply a covenant or an obligation in a document for the purpose of preventing the document, either altogether or in one particular respect, being meaningless or nugatory, you must not imply more than is strictly necessary for the purpose of keeping the document a sensible document. You must not embark on what the parties,

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if they had thought about the subject-matter, would have done by way of making provision for possible events, but you must only add to the document, by way of implication, sufficient to prevent its being meaningless, or what you are quite sure must have been the minimum intention of the person on whom you are going to cast the obligation, or rather, perhaps, the minimum intention in that respect of the parties to the document. That being so, and the next question being whether there has been a breach,—the interpretation of the covenant and the question of the breach being intimately connected—I cannot find that there has been, in the arrangement that was made with regard to the employment of the housekeeper and the dismissal of the housekeeper resident down to November, 1917, and in the subsequent employment of Mr. Henley, any breach of any implied obligation on the part of the lessors in these documents of tenancy under Gilby's trustees.

I have now to consider the question with regard to the other two sets of tenants, namely, Messrs. Kersey & Co. and Oakley, Sollas & Co. As regards the second agreement with Oakley, Sollas & Co. I do not think that there is any breach. The second agreement that was made was an agreement under which they were to pay so much a week for the services of the housekeeper, and here I may say, with regard to these two sets of tenants, that my view is that there is no room at all for any implied contract, or implied obligation in the agreements, because there is in the agreements themselves a provision as to what is to be done with regard to cleaning. There is an express obligation on the part of the landlords and, there being in those agreements an express obligation on the part of the landlords, it follows on ordinary principles that there is no room for any implied obligation, and I have only to look at the express obligation. In the second agreement with Oakley, Sollas & Co. the agreement is only this—that the lessors shall appoint and pay a housekeeper who shall act as the servant of the lessees in cleaning the rooms, being placed for that purpose in charge thereof by the lessees. As regards that, the remarks that I have already made as to the meaning of "housekeeper" apply. I do not think "housekeeper" means any more there than a person placed in charge for the purpose of superintending the cleaning, and there is no obligation at all on the

defendants to keep the housekeeper there during any specified hours.

That being so, I have to deal only with the agreement with Kersey & Co. and the first agreement with Oakley, Sollas & Co. Here there is, on the part of the lessors, an express agreement that the lessors will "appoint and pay a housekeeper to be in attendance between the hours of 8 A.M. and 10 P.M. on each weekday." I have only to inquire whether Mr. Henley, or his wife, has been in attendance at No. 52, Gracechurch Street between the hours of 8 A.M. and 10 P.M. on each weekday. In my opinion he clearly has not. It is absurd to suggest that he has been in attendance during those hours. He goes there at seven o'clock. He has been there to let the cleaners in, and has gone away, and has come back about half-past eight, to bring the letters, and to see the cleaners off, and to hand the keys to the tenants who come. He attends for a short time for that purpose, and then he either sends the porter about five o'clock, or comes himself in the evening, to look round and take over the keys from the tenants so far as the cleaners have not left them in the box. In the interval he comes there, he says, three times a day either by himself or by the porter. His evidence was that he might have been there two or three times a day for five, or ten, or perhaps fifteen minutes, and on those occasions, according to his evidence, he goes in a surreptitious manner, in a way that cannot be seen, for the purpose of seeing whether boys are whistling and that kind of thing. If the tenants want him they have to send round to No. 57, Gracechurch Street, where he may or may not be. Sometimes he is occupying himself with breakfast or with duties there or he may be occupying himself with similar duties at No. 2, Talbot Court. I think I can take this into account, that at the time of each of these lettings there were in the house rooms which were being occupied by a resident housekeeper; and when under those circumstances I find that in each of the documents there is an agreement to appoint and pay a housekeeper to be in attendance, and consider the nature of the property—in a separate court opening out into Gracechurch Street—I am clearly of opinion that the attendance intended is a physical attendance in or about the particular property, and that the sort

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of attendance which Mr. Henley gives at 57, Gracechurch Street, with occasional visits to 52, Gracechurch Street, is not in any way a proper attendance within the meaning of these two agreements.

That being so, in both these two actions, the action of Kersey & Co. and that of Oakley, Sollas & Co., there has, in my judgment, been a breach by the defendant company of their obligation under their contract.

The only other point I have to consider is what is the nature of the remedy to which the plaintiffs in these two actions are entitled ? It was set up originally by Mr. Grant that it was practically impossible to get anybody as a resident housekeeper at the present time, and that the necessity of circumstances prevented the defendants from carrying out their bargain. In my judgment the evidence has not shown anything of the kind ; the defendants have not in the least made out their case on that point. As far as I can see, there is no real difficulty in getting somebody who should be in attendance in accordance with the stipulation. The tenants themselves are ready to find somebody to perform these services, but the defendants do not wish to do it, and they attempt to justify themselves by saying " This is a test case. There are a number of other cases, and we want to know what the true remedy of the plaintiffs is." That only amounts to saying " We want to avoid performing the terms of our contract, not only in these cases but a large number of other cases, if the Court decides that it is a case in which specific performance cannot be granted having regard to the practice of the Court."

But I have to consider merely the bare point of law. All my sympathies are with the plaintiffs in this respect, and I wish I could grant them the relief of specific performance, but I am afraid that the authorities are too strong, and that the practice of the Court has been too well established in the opposite direction. I cannot grant specific performance having regard to what has been so decided. I notice that in the well-known case of *Ryan* v. *Mutual Tontine Westminster Chambers Association* (1) Kay L.J. says : " The plaintiff's right under this covenant appears to me to be to have

(1) [1893] 1 Ch. 116, 126.

the advantage of the performance of specified duties by the resident porter." I think that in this case, as in that, it is impossible in substance to sever the agreement into two, and to say that there is one part of the agreement that the lessor is to appoint and pay a housekeeper, and another part of the agreement that the housekeeper shall act as the servant of the lessees in cleaning the rooms. I think that here, as in *Ryan* v. *Mutual Tontine Westminster Chambers Association* (1), the plaintiffs' right under the covenant is to have performance of the specified duties by the person appointed by the lessors. It is true that here the duties are not a definite number of small duties such as are specified in that case; but I am not sure that that renders the case any better, because the result is that the Court might have to say exactly what the duties of being the servant of the lessees consisted of. It is true that what has to be done by the lessors is to give the lessees, not the services of the lessors,—of that, of course, there could not be specific performance —but they have to give them indirectly the benefit of the services of some one appointed by the lessors, and that person so appointed is to act as the servant of the lessees, and not only of one particular set of lessees, but the other lessees in the building. Having regard both to the fact that the Court would have to see to the enforcement of a long continued series of acts during the whole time of the tenancies of each tenant, and to the fact that there are a number of small services embraced in the general obligation of the person appointed to act as servant of the lessees, I cannot, consistently with the practice of the Court, grant specific performance of that obligation. In my view the right of the lessees here—I am very sorry to say that it is so—is a right to damages only. I feel that damages cannot be quite adequate compensation, but I cannot help feeling that it is a case in which the damages may prove to be substantial if they are based upon the comparative value of the tenancy, as supplied with a housekeeper performing these services, and the value of the tenancy as not supplied with the housekeeper. However, I do not want to prejudice the question. The only thing I can do is to grant an inquiry as to damages in the cases of those two tenants—that is, Messrs. Kersey & Co. and Oakley, Sollas & Co.

(1) [1893] 1 Ch. 116, 126.

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The first three actions were accordingly dismissed with costs, the costs of the other two actions being reserved until after the inquiry as to damages had been answered.

Solicitors for plaintiffs: *Sandom, Kersey & Knight.*
Solicitors for defendants: *Vincent & Vincent.*

F. E.

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1918
March 20, 22.

In re BOULTER.
CAPITAL AND COUNTIES BANK *v.* BOULTER.

[1917 B. 2714.]

Will—Legacy on Trust for Infant for Life contingently on attaining Twenty-one—Maintenance—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-s.* 1.

Where a legacy is held in trust for an infant for life contingently on attaining twenty-one, the trustees may, under sub-s. 1 of s. 43 of the Conveyancing and Law of Property Act, 1881, apply intermediate income for maintenance, notwithstanding that, not so applied, it will never belong to the infant.

Dicta of Cotton L.J. in *In re Dickson* (1885) 29 Ch. D. 336 and Cozens-Hardy L.J. in *In re Bowlby* [1904] 2 Ch. 711 considered and explained, and the latter not followed.

ORIGINATING SUMMONS.

By his will dated September 14, 1916, Stanley Carr Boulter, after appointing executors, appointed the plaintiffs to be trustees thereof. He bequeathed to them a sum of 8000*l.* Mercantile Investment and General Trust Company, Limited, deferred stock, which (and investments from time to time representing it) he referred to as "my grandchildren's fund," upon trust to pay the income to the child or children of his son Cyril in equal shares if more than one on their respectively attaining the age of twenty-one years during their respective lives, and as to females without power of anticipation, and as and when each of the children of his son should die (whether after or before the testator) to hold a share of the fund proportionate in value to the number of children of his son, as to both corpus and income, upon trust as therein mentioned, and on failure of those trusts to hold the grandchildren's fund, both corpus and income, for

the children of the testator's daughter Ethel G. M. Bendall and of his son Stanley John Boulter for their absolute benefit in equal shares. He died on January 5, 1917, and his will was duly proved. His son Cyril had issue one daughter only, the defendant Sheilah Boulter, an infant. The executors assented to the legacy fund and transferred the stock to the plaintiffs, who held it on the trusts of the will. Apart from the income of the legacy the only fund available for the maintenance of the infant was a sum of about 72*l.* a year under a settlement.

The trustees took out this summons to determine (inter alia) whether, according to the true construction of the will and under the power conferred by s. 43 of the Conveyancing and Law of Property Act, 1881 (1), or otherwise, the intermediate income of the fund till the infant should attain twenty-one was applicable for her maintenance.

Jolly, for plaintiffs.

C. J. Mathew, K.C., and *J. F. Carr*, for the infant. The only question is whether s. 43, sub-s. 1, of the Conveyancing and Law of Property Act, 1881 (1), applies. On the face of it, it would seem to. Here is "property held by trustees in trust for an infant for life," and the sub-section authorizes the trustees to "apply for the infant's maintenance the income of that property" whether there is or is

(1) Conveyancing and Law of Property Act, 1881, s. 43: "(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, ... the trustees may . . . . pay to the infant's parent or guardian . . . . or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

"(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, ... and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; . . . .

"(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, ...

"(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act."

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not any other fund applicable or any person bound to maintain the infant. It is admitted that s. 43 does not authorize the allowance of maintenance where, apart from the Act, the infant on attaining twenty-one would only be entitled to the legacy without interest: *In re Dickson.* (1)

[YOUNGER J. I had occasion to consider the matter in *In re Eyre.* (2)]

In *In re Bowlby* (3) the Court was only considering sub-s. 2 of s. 43, not sub-s. 1 at all, and the question was who was entitled to unapplied income and the accumulated surplus. So in *In re Humphreys.* (4)

[YOUNGER J. The difficulty here is that we are seeking to maintain the infant out of income which is never hers either vested or contingent. I agree it is a monstrous thing if the law is that she cannot be maintained out of it. But in no case can she ever get the funded income; she will, if she lives, get interest from it, but the fund itself she will never get.]

In re Cotton (5) was under Lord Cranworth's Act, s. 26.

[YOUNGER J. In Hood and Challis' Conveyancing, Settled Land, and Trustee Acts, it is said that makes no difference. Is there no case since Lord Cranworth's Act in which an infant to whom merely a life interest is given has been entitled to maintenance?]

In re Bowlby (3) comes nearest; see also *In re Cooper* (6). These cases are cited to show that, though the present point would be expected to have been raised, it does not seem ever to have been. In terms, sub-s. 1, taken literally, expressly applies. Nothing in the decided cases conflicts with this view.

Mossop, for a residuary devisee and legatee. Fairly considered, this case is covered by *In re Bowlby.* (3) The result of that case is that the tenant for life of a segregated fund is not entitled to intermediate income, and, therefore, is not entitled to maintenance out of it. Apart from that, this defendant is willing maintenance should be allowed.

W. G. Hart, for an infant daughter of Ethel G. M. Bendall. First, when a fund is segregated it carries intermediate income as an

(1) 29 Ch. D. 331.
(2) [1917] 1 Ch. 351, 356.
(3) [1904] 2 Ch. 685.
(4) [1893] 3 Ch. 1.
(5) (1875) 1 Ch. D. 232.
(6) [1913] 1 Ch. 350.

accretion to the fund: *In re Woodin* (1); Theobald on Wills, 7th ed. p. 181. Secondly, where a child is entitled to a segregated fund contingently on attaining twenty-one, and for life only, the child is not entitled to intermediate income even though attaining twenty-one. Thirdly, when a child is entitled at twenty-one contingently only, s. 43 does not justify maintenance unless the child becomes entitled to the intermediate income and the whole of it. These three propositions are the result of the authorities. Otherwise, this defendant would be glad to have maintenance allowed.

Cur. adv. vult.

March 22. YOUNGER J. (after stating the facts). In these circumstances, the question which I have now to determine is whether, according to the true construction of the provisions of the testator's will and under the statutory power conferred by s. 43 of the Conveyancing and Law of Property Act, 1881, or otherwise, the intermediate income of the grandchildren's fund until the defendant Sheilah Boulter shall attain the age of twenty-one years is applicable to her maintenance.

Upon the terms of s. 43 itself, apart from any judicial construction that may have been placed upon it, and assuming that no contrary intention appears in the will of the testator, the question so propounded, so far as that section is concerned, would appear to admit of only one answer. The case comes within the express words of the statute. There is here property held by trustees in trust for an infant for life contingently on her attaining the age of twenty-one years. Why, then, may not the trustees, in the very terms of sub-s. 1 of the section in that event provided, at their sole discretion pay to the infant's parent, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property or any part of it? The answer is that they are prevented by a qualification which, it is said, the Court of Appeal has decided to be implicit in the sub-section. The Court of Appeal has decided, so it is said, that the sub-section only applies where the income in question, if not applied in maintenance, would belong to the infant on attaining twenty-one. Now the income here in question can, having regard to sub-s. 2 as interpreted in *In re Bowlby* (2), never

(1) [1895] 2 Ch. 309, 314. (2) [1904] 2 Ch. 685.

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belong to the infant. Accordingly, it is said, sub-s. 1 has no application to the case. It results, as is admitted, that the power, in this particular event conferred apparently in express terms by sub-s. 1, can never be exercised by reason of the operation of sub-s. 2. Manifestly such a result is not lightly to be accepted. I have to consider whether I must submit to it.

Now, the primary purpose, both of s. 43 of the Conveyancing and Law of Property Act, 1881, and of s. 26 of Lord Cranworth's Act which it at once superseded and overlapped, was to save the insertion in wills and other documents of clauses usually set out at length there. Any construction of these sections, therefore, which is in accord with the practice as it existed apart from them, is to be preferred: see *In re Buckley's Trusts.* (1) Particularly it is not to be assumed that the Legislature was in these sub-sections authorizing the application for the maintenance of infants of funds which apart from them would belong to other people: *In re Dickson.* (2) For this reason, as also because the summons here asks whether maintenance may be allowed for this infant otherwise than under s. 43, it will be convenient to consider very briefly how far, apart altogether from either Act and from any special provisions in the governing instrument, maintenance can be provided for an infant out of the income of a contingent legacy, and what is the destination of the income of that legacy not applied in maintaining him.

The rule of the Court on this subject is, I think, quite settled. It depends, first, to some extent upon the question whether the testator was the father or stood in loco parentis to the infant. In such a case, even if the legacy be not by the testator directed to be set apart for the benefit of the legatee, the legacy will bear interest for maintenance for so long as no maintenance is expressly provided for the infant by the testator: see *In re Bowlby.* (3) On the other hand, a contingent legacy in favour of an infant of whom the testator is not the father, or towards whom he does not stand in loco parentis, and which is not directed to be set apart for the benefit of the infant, bears no interest either for maintenance or otherwise until it vests: *In re Dickson.* (4) Where, however, a contingent legacy is directed to

(1) (1883) 22 Ch. D. 583.
(2) (1884) 28 Ch. D. 291, 297.
(3) [1904] 2 Ch. 685, 706.
(4) 29 Ch. D. 331, 334.

be set aside so as to be available for the legatee so soon as the contingency happens, then the fund carries all its accretions from the moment when it is so set aside : *In re Medlock* (1) ; and whether an infant (if the legatee) be or be not one towards whom the testator stood in loco parentis, and whether the interest of the infant when vested be a right to the corpus or an interest for life only, the Court may allow maintenance out of the intermediate income, the income not so applied will be accumulated as part of the contingent legacy, and, in the language of Sir William Grant in *Hanson* v. *Graham* (2), will follow the fate of the principal. The Court, however, will not generally give maintenance out of such income if the father is living. There are exceptions to this last rule under one or more of which the father in the present case, at least for the duration of the war, may come. He has, however, to bring himself within them.

Now, it is with reference to that state of things that s. 26 of Lord Cranworth's Act and s. 43 of the Conveyancing and Law of Property Act, 1881, fall to be interpreted as above explained. Sect. 26 of Lord Cranworth's Act is as follows : [His Lordship read the section. (3)] Now, upon that section four points should for present purposes be emphasized. First,—and this is true also of s. 43 of the Act of 1881, so that I will not repeat the observation in connection with that section—the section relates only to funds which have been set apart in the hands of trustees. It has no application unless and until an appropriation is made. It is dealing, therefore, with income

(1) (1886) 55 L. J. (Ch.) 738.

(2) (1801) 6 Ves. 239.

(3) Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26 : "In all cases where any property is held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not ; and such trustees shall accumulate all the residue of such income, by way of compound interest . . . . for the benefit of the person who shall ultimately become entitled to the property from which such accumulation shall have arisen : . . . ."

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available for application in that case. Secondly, the section has no application unless the estate in the fund to which the infant is entitled is an absolute interest in the corpus of it. Thirdly, the only income under the section available for intermediate maintenance of the infant is in fact income which will be his if he becomes entitled to the property : see *In re George.* (1) Inasmuch, however, as the section only deals with property set apart for the infant, and only with property to the corpus of which the infant will on the contingency happening be entitled, that limitation has little practical operation in this section. Its omission from s. 43 of the Act of 1881 rather than its insertion here is the important matter for the purpose of the present case. Fourthly, the powers are exercisable by the trustees without the intervention of the Court, and whether there be any other fund applicable to the same purpose or any other person bound by law to provide for such maintenance or education or not—a valuable innovation upon the general rule, as above appears.

It is convenient now to proceed to s. 43 of the Act of 1881, in order to note the points in which it goes beyond the earlier section. Omitting words for present purposes irrelevant, that section is as follows : [His Lordship read the material parts of the section.] Now, while, as in the case of s. 26 of Lord Cranworth's Act, the section relates only to property set apart in the hands of trustees, and its powers are exercisable by the trustees without the intervention of the Court and on the same principles as those conferred by s. 26, there are two marked innovations, on which, indeed, the present case turns. The contingent interest of the infant need no longer be a right to the entire corpus of the fund : this new section applies and extends to a life interest as well as to any greater interest. Again, it is no longer, in terms, necessary that the income to be applied should be income "to which such infant may be entitled in respect of such property," as in s. 26 ; "the income of that property, or any part thereof," is now described to be the fund applicable for maintenance. And, when the general law as above stated as well as the provisions of sub-s. 2 are considered, the reason for both alterations in the section becomes obvious, or, rather, the second is consequential on the first. For the section is now extended

(1) (1877) 5 Ch. D. 837, 843.

to a contingent life interest in a fund set apart for an infant. The intermediate income of that fund may by general law be applied by the Court for his maintenance; but, it is not, and never will be, his. So far as unapplied it follows the fate of the fund. If the contingency happens, it is added to the capital; if it does not happen, it goes with the capital. And this, as authoritatively decided by the Court of Appeal in *In re Bowlby* (1), overruling *In re Scott* (2), is the effect of sub-s. 2 of s. 43. If, therefore, s. 43, sub-s. 1, was ever to apply to the case of an infant entitled contingently for his life, it was essential that the condition imposed by s. 26 of Lord Cranworth's Act, namely, that the income applicable should be income to which "such infant may be entitled in respect of such property," should disappear. And accordingly the condition does disappear, and there is substituted as the fund applicable at the discretion of the trustees "the income of that property, or any part thereof,"—in other words, the income which by the rule of the Court is applicable under the direction of the Court in the same event.

In these circumstances the statement of Cotton L.J. in *In re Dickson* (3) which is set forth below can only, it would seem, be explained by the fact that the Lord Justice was then considering only the case before him, that of a contingent interest in the corpus of the fund, and to such a case only was his attention directed. If he had had present to his mind the actual alteration with reference to contingent life interests effected in s. 26 of the older Act by s. 43 of the Conveyancing Act, he could not, I think, have used these words: "Undoubtedly a few words have been left out, but one cannot guess why they were left out, nor, indeed, why this section was introduced into the Act at all. It was possibly with a view to codify the law."

And the result of s. 43, as above indicated, is thus stated by Mr. Wolstenholme (see Conveyancing Acts by Wolstenholme and Turner, 3rd ed. p. 95) in terms which, as Kay J. in *In re Judkin's Trusts* (4) said, appear to be an accurate statement of its effect: "Where the income will go along with the capital if and when the capital vests, then the income is applicable under the section for the

(1) [1904] 2 Ch. 685.
(2) [1902] 1 Ch. 918.
(3) 29 Ch. D. 336.
(4) (1884) 25 Ch. D. 743, 748.

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benefit of the infant, otherwise not." And this view, following as it does the words of the Act, and carrying out also the general law apart from the Act, was apparently adopted—although, I agree, without argument—by Farwell L.J. in *In re Cooper* (1) and is, I should have thought, clearly right from every point of view.

It is, however, contended, as I have said, that the Court of Appeal has interpreted the section otherwise, and has decided that it has no application to any income to which the infant on the contingency happening does not himself become absolutely entitled. In my opinion, that assertion is not made out when the grounds on which it is based are examined. It rests exclusively on a passage to be found in the judgment of Cotton L.J. in *In re Dickson* (2), already cited, and a passage in the judgment of Cozens-Hardy L.J. in *In re Bowlby.* (3)

Now *In re Dickson* (2) was, as I have already said, a case of a gift of the corpus of a fund contingently on the legatee attaining twenty-one. In that case the fund was not set apart in the hands of trustees and, accordingly, did not come under either Act, but, so far as the quantum of estate there taken was concerned, it was, as I have shown, the only interest to which s. 26 of Lord Cranworth's Act applied. In the course of his judgment Cotton L.J. said (2): "That, to my mind, leads very strongly to the conclusion that this section does not extend the effect of Lord Cranworth's Act. Under that Act it had been decided that the infant could not be maintained out of the income unless, if he had attained twenty-one, he would have become entitled to the past income as well as to the corpus of the property. In my opinion the case is the same under the present statute." That is strictly correct, so far as it goes. In the case of such an interest there is no difference between the two sections in the result. In such a case neither section has any application unless the income will in fact go to the legatee if and when he receives the principal. Cotton L.J. is, however, not even remotely dealing with the case of the legatee being entitled for life only. The later passage in his judgment in the same case, already quoted, shows he had no such case in his mind: his observations cannot, therefore, properly be extended to such a case.

(1) [1913] 1 Ch. 350. (2) 29 Ch. D. 331, 336.
(3) [1904] 2 Ch. 685.

The subsequent passage in the judgment of Cozens-Hardy L.J. in *In re Bowlby* (1) is more difficult. There the Lord Justice says: "It is settled that s. 43 has no application unless, apart from the Act, the infant would under the terms of the will be entitled to the arrears of income on attaining twenty-one: *In re Dickson.* (2) This must mean either as tenant for life or absolutely. If a share of residue is given absolutely to an infant contingently on his attaining twenty-one, the infant will be entitled to both capital and arrears of income on attaining twenty-one, and s. 43 will apply. But if the infant only becomes tenant for life of the share of residue with its accretions on attaining twenty-one, the case does not fall within the language of s. 43, as interpreted by the Court of Appeal." There, however, it must be noted that the Lord Justice bases his view exclusively on *In re Dickson* (2), and presumably on the passage from Cotton L.J.'s judgment already quoted. He expresses no view of his own to the same effect. And he does not apparently notice that the statement in *In re Dickson* (2) had no reference to a life interest, to which he, again without expressing any opinion of his own, treated it as applicable. Further, the Lord Justice had just decided, overruling *In re Scott* (3), that the accumulated income, under sub-s. 2 of s. 43, was an accretion to capital, and I do not think he could have intended, by the observations I have read, to hold as a necessary result that the power expressly conferred by sub-s. 1 of s. 43 in the event mentioned could in the result never be exercisable; he would not, I feel sure, have done so had it been present to his mind that there had been omitted from s. 43 the words in s. 26 which alone in that section produced that result. Again, in *In re Bowlby* (4) maintenance had been allowed, and the propriety of the allowance was not questioned either by the Lord Justice or any other member of the Court. Lastly, the observation of the Lord Justice was a dictum only: it was, I think, plainly not concurred in by Romer L.J.—"clarum et venerabile nomen," whose passing we all mourn to-day, and who clearly thought (5) the daughter there entitled to maintenance under s. 43. The judgment of Vaughan Williams L.J. was mainly directed to other matters.

(1) [1904] 2 Ch. 685, 711.
(2) 29 Ch. D. 331, 336.
(3) [1902] 1 Ch. 918.
(4) [1904] 2 Ch. 685.
(5) [1904] 2 Ch. 710.

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In the result, therefore, I cannot find that there has been any decision of the Court of Appeal to the effect stated. If there were I should of course be bound to follow it, whatever my own opinion might be. In the absence of such a decision, however, I conceive I am equally bound to adopt my own view of the statute, a view not only in accord with its express terms, but with the rules of the Court applicable to such matters. There is in this will no contrary intention which would exclude the operation of the section, and in my judgment under it the intermediate income of the fund is applicable for the maintenance and so forth of this infant at the discretion of the trustees.

Solicitors: *Stanley, Woodhouse & Hedderwick; Wingfield, Blew & Co.*

A. L.

C. A. 1918 *May* 9.

FLINT *v.* ATTORNEY-GENERAL.

[1917 F. 621.]

Army—Military Service—Calling-up Notice—Claim to Exemption—"Regular minister of any religious denomination"—Action in High Court for Declaratory Judgment—Tribunal to determine Question—"Civil Court"—Jurisdiction—Army Act, 1881 (44 *&* 45 *Vict. c.* 58), *s.* 154; *s.* 190, *sub-ss.* 31, 35—*Reserve Forces Act,* 1882 (45 *&* 46 *Vict. c.* 48), *ss.* 12, 15, 28—*Military Service Act,* 1916 (5 *&* 6 *Geo.* 5, *c.* 104), *s.* 1, *sub-s.* 2; *Sched. I., par.* 4—*Military Service Act,* 1916 (*Session* 2) (6 *&* 7 *Geo.* 5, *c.* 15), *s.* 1, *sub-ss.* 1, 2.

The plaintiff, who had been served with a calling-up notice under the Military Service Act, 1916, brought an action against the Attorney-General for a declaration that he was exempt from military service on the ground that he was a regular minister of a religious denomination. Neville J., before whom the action came for trial, held that the High Court was not a "civil Court" within s. 1, sub-s. 2, of the Military Service Act, 1916, or s. 190, sub-s. 31, of the Army Act, 1881, and therefore he had no jurisdiction to determine the question whether the plaintiff came within the exception from military service under Sched. I., par. 4, of the Military Service Act, 1916. The plaintiff was then prosecuted before a Court of summary jurisdiction for failing to comply with the calling-up notice, and on that charge was convicted and fined, the justices having determined that he was not a regular minister

of any religious denomination and was therefore liable to serve, and this decision was affirmed by a Divisional Court upon a case stated by the justices. Upon appeal from the decision of Neville J.:—

Held, that, as the question of fact had been determined adversely to the plaintiff by a Court of competent jurisdiction, the appeal must be dismissed.

Decision of Neville J. [1918] 1 Ch. 216 affirmed.

APPEAL from a decision of Neville J. (1)

In this action the plaintiff sought to obtain a declaratory judgment that he was exempt from military service, on the ground that he was at all material times a regular minister of a religious denomination within the exception contained in Sched. I., par. 4, of the Military Service Act, 1916 (5 & 6 Geo. 5, c. 104). When the action came on for trial before Neville J. he held that he had no jurisdiction to determine the question, the plaintiff being restricted to proving his claim before a "civil Court" as defined by s. 190 of the Army Act, 1881, i.e. a Court of summary jurisdiction, which had the same meaning as in the Summary Jurisdiction Act, 1879. On that ground he dismissed the action. After this decision the plaintiff was charged before justices that he, being a man belonging to the Army Reserve under the Military Service Acts, failed to appear at the time and place appointed for assembling without leave lawfully granted or reasonable excuse, and upon that charge he was convicted and fined 40*s.* and handed over to a military escort. The question whether he came within the above-mentioned exception was thus decided against him. The case then went before a Divisional Court upon a case stated by the justices, and their decision upon the question of fact was affirmed.

The plaintiff now appealed against the decision of Neville J.

Pending this appeal the military authorities had not enforced the calling-up order against the appellant. The facts are more fully stated in the report of the case before Neville J. (1)

Compston, K.C., and *Ernest Williams*, for the appellant. Neville J. wrongly declined jurisdiction. At the date of the issue of the writ no offence had been committed by the appellant; there was therefore nothing upon which to found the jurisdiction of the civil Court. If Neville J. had heard the case and come to a

(1) [1918] 1 Ch. 216.

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conclusion upon the question of fact the justices would have held themselves bound by his decision. The appeal upon the question of law is open to the appellant. It is submitted upon the facts that the appellant is exempt from military service: *Offord* v. *Hiscock*. (1)

Sir Gordon Hewart, S.-G., *Austen-Cartmell*, and *Branson*, for the Attorney-General, were not called upon.

SWINFEN EADY M.R. I am of opinion that this appeal fails. Mr. Compston has carried it as far as he could, but it fails. The plaintiff is a person within military age, within the meaning of the Military Service Acts, but he claims that he is not liable for military service because he is within the exception, contained in Sched. I., par. 4, of the Military Service Act, 1916, which extends to "men in holy orders, or regular ministers of any religious denomination." He contends that he is a regular minister of a religious denomination. He brought the action by a writ issued on July 2, 1917, which was after he had received a calling-up notice, but the day before the date fixed by the calling-up notice for joining, namely, July 3.

The plaintiff is a young man appointed by the Evangelization Society to carry on work at Egham. The organization and constitution of the Evangelization Society is set out in the 53rd annual report of the society, and the basis of the society is set out at p. 46 of the report: "The Evangelization Society is a voluntary association formed in the year 1864 having for its fundamental object the spread of the knowledge of the Gospel of our Lord Jesus Christ amongst the inhabitants of the United Kingdom and elsewhere, especially the poor, and without regard to denominational distinctions." In other words, its basis, as set out, shows that it is, and it claims to be, an undenominational society. Now the learned judge when the case came before him dismissed the action upon a question of law, his view being that the High Court was not a "civil Court" within the statutory definition contained in s. 190 of the Army Act of 1881. It was held to mean a Court of summary jurisdiction. On that short point of law the action was dismissed. Since the matter was before the learned judge proceedings have been taken before a Court of summary jurisdiction, which the appellant con-

(1) [1917] W. N. 326; 15 L. G. R. 513.

ceded is a "civil" Court within the meaning of the statute, against the plaintiff, the charge against him being that, being a man belonging to the Army Reserve under the Military Service Act, he failed to appear at the time and place appointed for assembling without leave lawfully granted or reasonable excuse. That was the charge made against him before the magistrates, and upon that he was convicted and fined 40*s.*; we were told also that he was committed to a military escort. The magistrates were asked to state a case. They did so, and the decision on that case was adverse to the plaintiff, so that the conviction stands. Therefore upon proceedings before a "civil Court," a Court of competent jurisdiction, it has been determined that he is a person belonging to the Army Reserve; so that, although when this case now under appeal came before the learned judge below it was decided on the short point of law, since that date the fact has been decided that the plaintiff is a person liable to military service, and from the decision of that civil Court there is no appeal: the only remedy on special case has been taken, and there is therefore a final decision and conclusion that the plaintiff is a person liable to military service within the Military Service Act. That being so, the question of fact having been decided since the matter was before the learned judge below there is no question that can arise now for judgment in the action. For these reasons I am of opinion that the appeal fails and must be dismissed.

WARRINGTON L.J. I am of the same opinion. The allegation on which the plaintiff's claim to the declaration he asks for is founded is that he was at all material times a regular minister of a religious denomination, and was therefore within the exceptions of the principal Military Service Act of 1916 and not liable to military service. The learned judge, Neville J., before whom the action came, was of opinion that he had no jurisdiction to entertain it, and on that ground, without determining the question whether or not the allegation of fact was true, dismissed the action. Since that judgment the question of fact has been conclusively determined against the plaintiff by a competent tribunal. We are asked to say that the judge was wrong in point of law in declining to entertain the action. Supposing we were to take the view of the appellant on that

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point, there would necessarily be one of two results—either we must ourselves consider the question of fact, or we must remit it to the learned judge to do so; in either case it would be found that the question has been conclusively determined against the plaintiff, and therefore that the whole basis of his action is destroyed, and there must be judgment against the plaintiff. On that ground I think the appeal fails.

DUKE L.J. I agree.

Solicitors: *Engall & Crane; The Treasury Solicitor.*

G. A. S.

ASTBURY J. 1918 *April* 17.

In re JANES' SETTLEMENT. WASMUTH *v.* JANES.

[1918 J. 139.]

Revenue—Income Tax—"Annual Sum"—Weekly Sum payable every Wednesday—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 102—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

A fixed weekly payment made payable on a fixed day every week for a period possibly exceeding a year is an "annual sum" within the Income Tax Act, 1842, s. 102, and the Income Tax Act, 1853, s. 40, so that the person liable to make the payment is entitled to deduct income tax.

In re Cooper [1917] W. N. 385 (calendar month) applied.

ORIGINATING SUMMONS.

By a separation deed dated Wednesday, September 3, 1913, and made between the husband of the first part, the wife of the second part, and a trustee of the third part, after reciting that the husband and wife (then enceinte) had agreed to live separately, the husband covenanted with the wife (inter alia) that he would from the date thereof until her accouchement, "if they shall so long live separate from each other," pay the trustee the weekly sum of 8*l.* in trust for the wife for her separate use without power of anticipation, and would also pay the costs and expenses of the accouchement.

And also from and after the accouchement would during the joint lives of himself and his wife, "if they shall so long live separate from each other," pay the trustee the weekly sum of 9*l.* in trust for the wife for her separate use without power of anticipation, the first of such weekly payments to be made on the signing thereof and the future payments to be made on every Wednesday following.

The husband paid the trustee the sum of 8*l.* a week up to the wife's accouchement, which took place on Tuesday, March 10, 1914. He then paid the trustee 9*l.* a week until some time in June, 1914, after which he paid the wife direct. He declined, however, to pay the accouchement expenses, until the wife recovered judgment against him.

The last payment of the 9*l.* was made on Wednesday, January 2, 1918. After this the husband claimed to deduct income tax from the future payments and also to deduct 117*l.* income tax on past payments.

On February 7, 1918, the trustee and the wife issued this summons to determine (*a*) whether the husband was entitled to deduct income tax on future payments of the weekly sum of 9*l.*, and (*b*) whether he was entitled to deduct the 117*l.* on past payments. The second point was abandoned by the husband at the hearing.

Du Parcq, for the trustee and the wife. The Income Tax Act, 1842, s. 102, provides that upon "all annuities, yearly interest of money, or other annual payments" payable (inter alia) "as a personal debt or obligation by virtue of any contract," whether "received and payable half-yearly or at any shorter or more distant periods," income tax shall be charged. This is the charging section.

The Income Tax Act, 1853, s. 40, provides that every person who shall be liable to the payment of "any rent, or any yearly interest of money, or other annual payment" (inter alia) "as a personal debt or obligation by virtue of any contract," whether the same shall be "received or payable half-yearly or at any shorter or more distant periods," shall be entitled to deduct income tax; and the person liable to the payment shall be discharged of the amount deducted, as if the amount had actually been paid to the payee.

ASTBURY J. 1918 JANES' SETTLEMENT, *In re.* WASMUTH *v.* JANES.

The liability to taxation and the right to deduct therefore depend on the sum payable being "yearly interest" or an "annuity" or "other annual payment" ejusdem generis: *Foley* v. *Fletcher.* (1) On this point the sections are indistinguishable. The words point to interest at a yearly rate, as in *Bebb* v. *Bunny* (2), or a periodic payment fixed by some aliquot part of a year, e.g. the artificial calendar month, as in *In re Cooper.* (3) In those cases the payments in each year being constant are treated as annual payments.

But a week is a period of time fixed with reference to a different unit altogether, namely, a day. It has no direct relation to a year. It is true, of course, that there happen to be about 365¼ days in a year, so that the average annual equivalent of 9*l.* a week could no doubt be calculated. But the actual payment in any year would depend on the number of Wednesdays. In every cycle of twenty-eight years there would be five years with fifty-three Wednesdays carrying a payment of 477*l.* and twenty-three years with fifty-two Wednesdays carrying a payment of 468*l.* These variable amounts, fixed with no reference whatever to a year, surely cannot be annuities or annual payments within the sections.

Again, the words "if they shall so long live separate from each other" point to a short separation less than a year and bring the case within *Goslings & Sharpe* v. *Blake.* (4)

Micklem, K.C., and *Roland Burrows*, for the husband. *Goslings & Sharpe* v. *Blake* (4) is confined to short loans for a definite period less than a year. The present covenant pointed to a period that might exceed a year, as has happened, and on that point the case is governed by *Bebb* v. *Bunny* (2) and *In re Craven's Mortgage.* (5)

On the main point, the fact that a week is not an aliquot part of a year, so that the actual amount paid each year varies with the number of Wednesdays, is absolutely immaterial. The same argument would apply to a fixed payment per lunar month, or even per day. If, as here, it is contemplated that the payment may extend over a year, it is an annual payment although the amount in each year is variable. A quarterly payment is clearly within the sections: *Blount* v. *Blount* (6); and so is a payment per calendar

(1) (1858) 3 H. & N. 769, 779.
(2) (1854) 1 K. & J. 216, 219.
(3) [1917] W. N. 385.
(4) (1889) 23 Q. B. D. 324, 330, 331.
(5) [1907] 2 Ch. 448, 457.
(6) [1916] 1 K. B. 230.

month: *In re Cooper.* (1) The fine distinction suggested in the case of a week is untenable.

Du Parcq in reply. No doubt a daily, weekly, or lunar monthly payment is within the spirit of the law. But in fiscal cases the letter, and not the spirit, must be regarded: *Partington* v. *Attorney-General.* (2) The strict answer to the question whether a weekly sum payable every Wednesday is an annuity or annual payment is clearly "No." It is a casus omissus in the sections, and the summons should be answered accordingly.

ASTBURY J. (after stating the facts). The real question is whether the weekly payment of 9*l.* every Wednesday is an annuity or other annual payment within the sections.

In *Bebb* v. *Bunny* (3) Wood V.-C. held that a purchaser liable to pay interest on his purchase-money might deduct income tax from that interest. He said: "The whole difficulty is in the expression 'yearly' interest of money; but I think it susceptible of this view, that it is interest reserved, at a given rate per cent. per annum; or, at least, in the construction of this Act, I must hold, that any interest which may be or become payable de anno in annum, though accruing de die in diem, is within the 40th section. I cannot make any solid distinction between interest on mortgage money and interest on purchase money . . . . I consider the Act very singularly worded, yearly interest being used apparently in the same sense as annual payments; but I am clearly of opinion that it means at least all interest at a yearly rate, and which may have to be paid de anno in annum; such as interest on purchase money, as well as mortgage interest; and that, therefore, the purchaser is entitled to deduct the tax in this case. In fact, if this interest be not subject to such deduction, I do not well see how it can be charged with the tax at all."

In *Goslings & Sharpe* v. *Blake* (4) it was held that interest upon a loan by a banker to a customer for a period of less than a year was not within the words "any yearly interest of money or any annuity or other annual payment" in s. 40, and therefore the

(1) [1917] W. N. 385.
(2) (1869) L. R. 4 H. L. 100, 110, 122.
(3) 1 K. & J. 216, 219.
(4) 23 Q. B. D. 324, 330, 331.

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customer was not entitled to deduct income tax from that payment. But Lindley L.J. made it quite clear that in the case of ordinary mortgages, which though expressed to be repayable in six months usually lasted over a year, the section was applicable, and Bowen L.J. said that their judgment did not go beyond short loans and that *Bebb* v. *Bunny* (1) was not interfered with.

In *In re Craven's Mortgage* (2) Warrington J., after referring to these two cases, said: "*Goslings & Sharpe* v. *Blake* (3) is confined to short loans for periods of less than a year, and *Bebb* v. *Bunny* (1) applies where interest is reserved for a period of more or less than a year, but is calculable by periods of a year."

In *In re Cooper* (4) Sargant J. had a similar point before him. A testator gave his residuary realty and personalty to his trustees upon trust for sale and conversion and directed them to pay thereout to his wife the sum of 50*l.* in every calendar month during her life. Sargant J., after saying that he had not to decide whether the wife was ultimately bound to pay the tax after going to the proper authorities, and after referring to the three authorities I have cited, said: "Here the testator had contemplated payments extending over a year, and had adopted as the unit of payment the one-twelfth of a year into which the calendar year was divided. Looking at the substance of the matter, his Lordship was clearly of opinion that the money payment was an annuity, and, if not an annuity, that it was an annual payment in respect of which income tax ought to have been deducted."

It seems extraordinary that a sum payable every calendar month should be within the sections, because the testator or covenantor has adopted an aliquot part of the calendar year as his unit of payment, but that a weekly payment, though contemplated to extend over a year, should be in a different category. It is, however, pointed out that a sum payable every calendar month must be a definite sum per annum, whereas a sum payable weekly is variable, owing to there being fifty-two weeks and one day in an ordinary year and fifty-two weeks and two days in leap year, the odd days making up an extra week in every five or six years. It is therefore

(1) 1 K. & J. 216, 219.
(2) [1907] 2 Ch. 448, 457.
(3) 23 Q. B. D. 324, 330, 331.
(4) [1917] W. N. 385.

contended that a weekly sum is not an annuity or annual payment within the sections.

The prospect is somewhat alarming, as, if the contention is sound, the Income Tax Acts can be evaded in a manner that one does not care to contemplate. But the contention is really unsound. The covenant is in substance a covenant to pay so much a year by weekly payments of 9*l.* every Wednesday. No doubt in some years there will be fifty-two and in others fifty-three payments. But the covenant is really a covenant to pay an annual sum determined by the number of Wednesdays in each successive year. The principle of *In re Cooper* (1) applies, and the income tax is deductible.

Solicitors: *Avery & Wolverson; Charles M. Benwell.*

G. R. A.

In re HARRISON. HUNTER *v.* BUSH.

[1918 H. 52.]

Will—Construction—Legacy to Trustees in Trust for Legatee—Settlement of Legacy on Trusts—Failure of Trusts—Destination of Legacy on Death of Legatee.

The rule in *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551 and *Hancock* v. *Watson* [1902] A. C. 14 applies equally to the case where a legacy is bequeathed to trustees in trust for the legatee as to the case where it is bequeathed directly to the legatee in the first instance.

Testator bequeathed legacies to his trustees in trust for his five sons and daughters, including a legacy of 30,000*l.* in trust for his son W., with a provision postponing payment of all these legacies till his wife's death. He then gave his residuary real and personal estate between his five children, and further declared that each legacy thereinbefore bequeathed to his trustees for a son or daughter should after the death of the survivor of the testator and his wife be invested by his trustees and held upon trust to pay the income to such son or daughter for his or her life, and after his or her death upon usual trusts in favour of his or her children or issue; and as to each legacy thereinbefore bequeathed to the trustees for a son the testator empowered his trustees during the son's life to revoke all

(1) [1917] W. N. 385.

YOUNGER J. 1918 HARRISON, *In re.* HUNTER *v.* BUSH.

or any part thereof and declare any new trusts in favour of such son or any wife or issue of his and any other issue of the testator. W. survived the testator's wife and died a bachelor :—

Held, that W.'s executors were now entitled to the legacy so far as it was undisposed of under the settlement trusts.

ADJOURNED SUMMONS.

Henry Harrison, who died in 1893, by his will, dated November 21, 1892, appointed his brother James, his son Francis, and E. T. Moore his executors and trustees, and after making certain specific and pecuniary bequests, and after bequeathing an annuity of 3000*l.* to his wife, bequeathed to his trustees four several legacies of 20,000*l.* each in trust for his said son Francis and the testator's three daughters by name respectively and a legacy of 30,000*l.* in trust for his son William ; but directed that the said five legacies lastly thereinbefore bequeathed should not become payable until the death of the testator's wife, and further directed that the same legacies should carry interest as therein mentioned. And subject thereto the testator gave his residuary real and personal estate to his five children in equal shares ; and the testator declared that each legacy thereinbefore bequeathed to his trustees for a son or daughter should after the death of the survivor of the testator and his said wife be invested by his trustees, and that the trustees should hold the same legacy and investments thereof upon trust to pay the income of the same legacy and investments to such son or daughter for his or her life, and after his or her death upon such trusts and subject to such powers and provisions for the benefit of any child or children or remoter issue of such son or daughter as he or she should by deed or will appoint, and in default of and subject to any such appointment upon usual trusts in favour of his or her children ; and after giving to a son or daughter power to appoint a life interest to a surviving wife or husband the testator provided and declared as to each legacy thereinbefore bequeathed to his trustees for a son of the testator that his trustees might at any time during the life of such son, if they should in their uncontrolled discretion think fit so to do, revoke by deed all or any part thereof, and declare any new or other trusts of and concerning such legacy or any part thereof in favour of any of the following persons, namely, the testator's same son, any wife of his, any issue of his, and any other issue of the testator.

The widow died in 1899, and shortly afterwards the legacy of 30,000*l.* was appropriated and separate trustees thereof were appointed. The son William made a will appointing executors and died in 1917 a bachelor. Part of the legacy of 30,000*l.* had been raised and paid to him during his life under the power in that behalf conferred on the trustees by the will, and this was an originating summons raising the question whether his executors were now entitled to the remaining part of the legacy or whether it fell into the residue.

E. E. H. Brydges, for the summons.

Owen Thompson, for William's executors. The case falls within the rule in *Lassence* v. *Tierney* (1) and *Hancock* v. *Watson* (2), and the executors of the son William are entitled to the legacy originally bequeathed in trust for him so far as it is now undisposed of by the superadded trusts contained in the testator's will.

Percy Wheeler, for the residuary legatees other than William. This legacy, so far as it is undisposed of by the testator's will, falls into the residue. The rule in *Lassence* v. *Tierney* (1) and *Hancock* v. *Watson* (2) is inapplicable to the present will, where the gift is not made absolutely to the son in the first instance but to trustees upon trust for the son, a distinction which is kept up throughout the will. There is no absolute gift as between the legatee and the estate. The rule in question is only applicable where there is a complete segregation of the legacy from the rest of the testator's estate, and that is not the case here, where the original gift is by way of trust. The present case is similar to *Lassence* v. *Tierney* (1), where the actual decision of Lord Cottenham L.C. was that the will in that case did not fall within the rule which he there stated and which is relied on against me. [He also cited *Gompertz* v. *Gompertz* (3) and *Rucker* v. *Scholefield*. (4)]

Owen Thompson in reply. For the application of the rule in question it makes no difference whether the gift is made directly to the legatee or whether it is made through the machinery of a trust. There is an out and out trust in favour of the son under which, but for the subsequently engrafted trusts, he would have been entitled

(1) 1 Mac. & G. 551.
(2) [1902] A. C. 14.
(3) (1846) 2 Ph. 107.
(4) (1862) 1 H. & M. 36.

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to call for a transfer of the legacy to himself. There is no series of trusts created from the commencement of this will; on the contrary, the residuary gift is interposed between the original trust in favour of the son and the settlement trusts, which makes the case still stronger in my favour. *In re Currie's Settlement* (1) and *In re Connell's Settlement* (2) are cases in which the rule was applied to gifts made through the medium of a trust.

YOUNGER J. As I understand the authorities on this point, the rule of construction which is commonly known as the rule in *Lassence* v. *Tierney* (3) or *Hancock* v. *Watson* (4) is based on this proposition, that, if in the language used you find what amounts to an absolute gift with limitations subsequently engrafted on that absolute gift which do not exhaust in every event the whole capital, the principle of sound construction is that, to the extent to which the subsequent dispositions do not in the event exhaust the whole interest in the property, the original absolute gift remains. In my view that is a sound rule of construction and not an artificial one, nor is it limited to any one class of instrument, nor to direct gifts only as distinguished from gifts made through the medium of a trust: it extends to all gifts made in language apt to make it applicable.

In the case before me it is not seriously disputed that if the testator had bequeathed these legacies in favour of his sons and daughters by words of direct gift, engrafting on that gift the trusts which follow, then, on the principle of *Lassence* v. *Tierney* (3) and *Hancock* v. *Watson* (4), the absolute gift would in the case of the son who has recently died a bachelor have taken effect. But it is said that the rule does not apply to this will because the testator has given the legacies through the medium of trustees who are directed to deal with them as directed by the will, and therefore it is said there is no provision which has separated the legacies absolutely from the testator's estate restricting only their mode of enjoyment; on the contrary it is urged that, the legacies being retained throughout by the trustees of the will, the testator has not segregated them from his estate so as to bring them within the operation of the

(1) [1910] 1 Ch. 329.
(2) [1915] 1 Ch. 867, 880.
(3) 1 Mac. & G. 551.
(4) [1902] A. C. 14.

rule of construction to which I have referred. I should be sorry if I thought it necessary on such a ground as that to hold that the rule, which in my opinion is a thoroughly sound rule, has no application. But I do not feel in any way compelled to do so, because if segregation is necessary for the application of the rule, I do find such a segregation in this will in the fact that the legacies are in the first instance given to the trustees on out and out trusts for the legatees, and there is therefore, both legally and equitably, a complete separation of them from the testator's estate. The only argument then remaining is that in dealing with dispositions of this kind, made through the medium of a trust and not by way of direct gift, the Court is to apply a different rule of construction from that which is applicable to a gift made directly to the legatee; but so far from that being the case, it appears to me that there is ample authority to the contrary to be found in such cases as *In re Currie's Settlement* (1) and *In re Connell's Settlement* (2), in each of which the rule in question was applied, though the gift was made through the medium of trustees. The capital of this legacy, therefore, not having been completely disposed of by the trusts engrafted on the original gift, and there being nothing in the fact that the gift is made through the medium of a trust to prevent me from applying this sound rule of construction, I hold that, in the events which have happened, the executors of the testator's son William are entitled to this legacy so far as it has not been disposed of, and I make that declaration accordingly.

Solicitors: *King, Wigg & Brightman, for Broomhead, Wightman & Moore, Sheffield; Sharpe, Pritchard & Co., for Bramley & Son, Sheffield.*

(1) [1910] 1 Ch. 329. (2) [1915] 1 Ch. 867.

A. C.

YOUNGER J.

1918

March 14, 15.

In re SCHOFIELD.

BAKER *v.* CHEFFINS.

[1917 S. 2561.]

Will—Construction—Gift in Terms of Joint Tenancy—Gift over of "Share"—Joint Tenants or Tenants in Common.

Testator gave all his real and personal property to his widow during her life, and after her death gave certain houses to his three grandchildren by name, but subject to a further life interest in favour of their mother, and in the event of the death of either of them directed his or her "share" to go to the survivors. One grandchild died in his mother's lifetime but after the death of the testator's widow. The Court having held that the express gift over was limited to death in the lifetime of the testator's widow :—

Held, also, that, notwithstanding the use of the word "share" in the gift over, on the true construction of the will the three grandchildren took as joint tenants and not as tenants in common.

Adjourned Summons.

Wentworth Schofield, who died in 1880, by his will dated June 17, 1875, gave all his real and personal estate to his widow during her life, and after her death made a specific devise to his son Wentworth Schofield, whom he appointed his executor, and continued : "To my grandchildren Arthur Cheffins Alice Cheffins and Ada Cheffins I give all those three dwelling houses Nos. 52, 53 and 54 situate and being in Bull Street, Stratford-on-Avon, aforesaid, but my daughter Alice Cheffins shall have power to receive the rents of the aforesaid houses so long as she keeps separate and apart from her present husband and her receipt shall be a sufficient discharge for the said rents independent of her present husband, but in the event of the death of either of the said three children their his or her share to go to the survivors, but in case of the death of all three then I direct that the said houses shall be divided among and between all my children who may be then living."

The testator's widow died on October 12, 1892. Arthur Cheffins died on March 5, 1894, under the age of twenty-one years in the lifetime of his mother, Alice, who died on December 15, 1916.

This was an originating summons, taken out by the two surviving

grandchildren, on which the Court held that on the true construction of the will the gift over did not take effect on the death of a grandchild in the lifetime of his or her mother, but was confined to death during the lifetime of the testator's widow. The question then arose whether the three grandchildren took under the original gift as joint tenants or as tenants in common.

J. W. Manning, for the surviving grandchildren. The original gift to the three grandchildren is clearly a gift to them as joint tenants, and the reference to their, his, or her "share" in an event which might or might not happen is not a sufficient indication that the testator did not intend the original gift to take effect according to its terms. The gift over only expands the incidents of a joint tenancy, and gives effect to them notwithstanding any attempted severance by the grandchildren during the life of the widow.

J. E. Harman, for the heir-at-law of Arthur Cheffins. The gift over of their, his, or her "share" is a sufficient indication that the testator intended the three grandchildren to take as tenants in common and not as joint tenants, and it is immaterial for this purpose that, in the events which happened, the gift over did not take effect: *Paterson* v. *Rolland* (1); *Edwardes* v. *Jones* (2), per Lord Romilly M.R.; *Robertson* v. *Fraser.* (3)

J. W. Manning in reply.

[*In re Woolley* (4) was also referred to.]

YOUNGER J. This summons raises a rather curious point. I have already held that in the event of the death of any one of the three grandchildren of the testator in the lifetime of his widow, that is before the period of distribution the gift over takes effect, but that it does not take effect in the event of the death of any of them after that period. The result, therefore, is that, in the events which have happened, the original gift of these houses to the three grandchildren has come into operation and the effect of it has now to be determined. It is not disputed that the original gift is a gift to the three as joint tenants, but the question

(1) (1860) 28 Beav. 347.
(2) (1864) 33 Beav. 348.
(3) (1871) L. R. 6 Ch. 696.
(4) [1903] 2 Ch. 206.

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is whether there is a sufficient indication on this will that the testator intended them to be regarded as tenants in common by reason of a subsequent provision which is as follows: [His Lordship read the gift over and continued:] The question is whether that provision dealing with an event which has not happened is a sufficient indication that the original gift to the grandchildren in terms creating a joint tenancy is in truth a gift to them as tenants in common. Mr. Harman says that it is a sufficient indication because it refers to a grandchild's interest as "his or her share," and he contends that such a reference is by itself enough and that the Court will seize on the use of the word "share"—as distinguished, for instance, from the word "estate," which was the word used in *Edwardes* v. *Jones* (1)—to justify it in holding that the words of the original gift import a tenancy in common. Now it seems to me to be clear that the question is one of intention on the part of the testator, and that the Court has to attribute to the word "share" such a significance as is in accordance with that expressed or imputed intention. Accordingly it becomes in my view a relevant consideration in ascertaining the intention to determine whether the use of the word may not merely be to import a desire that some of the normal incidents of a joint tenancy shall not apply, as for example the incident of severability. Here the testator has during the life of the widow provided for the destination of the property in the way in which it would devolve under a joint tenancy, that is, by directing it to go to the survivors. Up to the moment of indefeasibility, therefore, survivorship will necessarily take place, and, as Mr. Manning pointed out, the reference to a share really has the effect of rendering it impossible for the three grandchildren during the life of the widow to effect a severance or cause the property to go in any other way than it would normally go under a joint tenancy vested at the testator's death; and if, as I think, the provision was, however, unnecessarily inserted with this intention, it would be a little difficult to express it in any other words than those which the testator has himself used. I am of opinion, therefore, that the use of the word "share" in this will where it occurs is not sufficient to displace the natural construction to be placed on the original gift, and that, in the events which have happened, the three grand-

(1) 33 Beav. 348.

children became indefeasibly entitled on the death of their grandmother as joint tenants and not as tenants in common.

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Solicitors: *Sharpe, Pritchard & Co., for James, Barton & Kentish, Birmingham; Taylor, Hoare & Jelf.*

A. C.

KLUG *v.* KLUG.

[1911 K. 18.]

NEVILLE J.
1918
March 20.

Will—Settled Legacy—Power of Advancement—Raising Legacy Duty out of Capital—Discretion of Trustees—Refusal of Trustee to exercise Discretion—Control of the Court.

Under a will, and in the events which happened, one third of the testator's residuary estate was held in trust for his daughter, a married woman, for her life without power of anticipation and after her death for her issue, with a gift over in default of her issue for his sons and their issue respectively. The will empowered the trustees to raise not more than a moiety of the vested share for the time being of any of the testator's said children and to apply the same for the advancement or benefit of such children in such manner as his trustees should think fit.

Owing to the circumstances of her birth and to the increased cost of living caused by the war, the daughter was unable to pay the legacy duty, which was at the rate of 10 per cent., on her settled share out of her income, and applied to the trustees for assistance. On a summons by the trustees the Court was of opinion that the trustees could, in the exercise of their discretion under the power of advancement, raise and pay the duty out of the corpus of the settled share, and left them to decide whether they would so exercise their discretion. One of the trustees was willing to exercise the discretion in aid of the daughter, but the other trustee, the testator's widow, declined to exercise it because her daughter had married without her consent:—

Held, that the Court, in the exercise of its control over the discretion of the trustees, could direct the trustees to raise out of the corpus of the settled share a sum sufficient to pay the duty.

ADJOURNED SUMMONS.

H. Klug, by his will made in 1907, after appointing executors and trustees and bequeathing to them a sum of 10,000*l.* upon trust for his wife during widowhood and directing that after her death

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or remarriage the 10,000*l.* should form part of his residuary estate, devised and bequeathed his real and personal estate upon usual trusts for sale and conversion and investment, and directed his trustees to hold the investments (referred to as his residuary trust fund) upon trusts (as altered by a codicil) for such of his three children Frida, Henry, and Christian as being sons should attain the age of thirty years, or being a daughter should attain the age of twenty-one years or marry under that age in equal shares, provided that during suspense of vesting of the share of any child in his residuary trust fund his trustees should so long as his wife should continue his widow pay the income of such share to her to be applied by her for the maintenance, education, and benefit of herself and such of his said children as should not for the time being have acquired a vested interest in any share of his residuary trust fund as she should think fit; and the testator declared that if his daughter should attain the age of twenty-one or should marry under that age her share in his residuary trust fund should be held in trust for her for life for her separate use without power of anticipation, and after her death for her issue as therein mentioned, with a gift over in default of issue by way of accruer to her brother's shares, with an ultimate gift over, on failure of issue of all his said three children, for the testator's brothers in equal shares; and the testator declared that his trustees might raise any part or parts not exceeding in the whole a moiety of the expectant presumptive or vested share for the time being of any of the said children under any of the trusts of his will and pay or apply the same for the advancement or benefit of such children in such manner as his trustees should think fit.

The testator died in May, 1910, and at that time his three children were infants.

In March, 1911, on an originating summons taken out by the trustees, an order was made for the administration of the testator's estate, and usual accounts and inquiries were directed.

Frida Klug attained her age of twenty-one years in August, 1915, and owing to the circumstances of her birth the legacy duty payable on her beneficial interest under the testator's will was at the rate of 10 per cent. Arrangements were made with the Inland Revenue authorities for payment of this duty by four equal annual instalments of 107*l.* 9*s.* 5*d.*, and by a deed dated November 25, 1915, she

mortgaged her life interest in her own third share of the testator's residuary trust fund and a policy on her life to an insurance office to secure an advance of 250*l.* with interest, and out of this sum she discharged the first two instalments of the legacy duty on her share, and by an order made in the action in January, 1916, it was ordered that out of her one-third share of the income of the funds in Court the interest and premiums due in respect of the mortgage should be paid to the insurance office.

In March, 1916, Frida Klug married one Jean Moro against the wishes of her mother.

In 1917, owing to the investments (mostly foreign) representing the testator's residuary estate not producing so much income as in former years by a large amount and to the increased cost of living caused by the war, Madame Moro found it impossible to provide out of her income for the instalment of legacy duty which fell due in August, 1917, and the instalment which would fall due in August, 1918, and was unable to borrow further moneys on her life interest owing to the restraint on anticipation, and applied to the trustees for assistance. Thereupon the trustees, who were the Public Trustee and the testator's widow, issued a summons in the action for directions as to what steps should be taken to discharge the claim of the Inland Revenue authorities for the instalments of legacy duty which became due on August 17, 1917, and which would become due on August 17, 1918.

At the hearing of the summons on October 15, 1917, the Court expressed the opinion that the trustees had power under the advancement clause in the testator's will to raise the legacy duty out of the capital of the share to the income of which Madame Moro was entitled, but left it to the discretion of the trustees to decide whether they would exercise that power or not, and the summons stood over for that purpose.

Correspondence then ensued between the Public Trustee and the testator's widow, in which he fully explained the position to her and stated his willingness to concur with her in exercising their discretion in favour of Madame Moro. But the testator's widow absolutely refused to assist her daughter in any way because she had married without her approval.

Under these circumstances the summons now came on again.

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Howard Wright, for the trustees.

Ward Coldridge, K.C., and *C. G. Church*, for Madame Moro. It is submitted that a power of advancement is analogous to a power of maintenance, and that where trustees fail to exercise the power or cannot agree the Court will in a proper case interfere and exercise the power: Lewin on Trusts, 12th ed. pp. 735-6; *In re Hodges* (1); *In re Roper's Trusts.* (2)

[NEVILLE J. referred to *Wilson* v. *Turner.* (3)]

There the trustees exercised no discretion at all. That case is discussed and explained in *In re Bryant.* (4) Here the mother is prejudiced against her daughter and has not really exercised her power.

W. F. Swords (for *Eardley-Wilmot*, serving with His Majesty's Forces), for the immediate remainderman. The Court will not interfere with trustees in the honest exercise of their discretion, even although they may not agree: *Gisborne* v. *Gisborne* (5); *Tempest* v. *Lord Camoys* (6); *In re Boys.* (7) Mrs. Klug has not exercised her discretion mala fide. If she had given no reason at all for her refusal the Court could not have overridden her discretion. Her refusal to exercise her discretionary power because she is displeased with her daughter's marriage is not evidence of mala fides.

Beebee, for the ultimate remainder, adopted the same line of argument.

Howard Wright referred to *In re Wilkes's Charity.* (8)

NEVILLE J. In this case Madame Moro is entitled to a life interest in one third of her father's residuary estate with remainder to her children, and has to pay a legacy duty of 10 per cent. because, according to English law, she is to be considered a stranger to her father. But that is not material, the real question here being when and how far the Court will interfere with the discretion given to trustees. I should be sorry by anything I may say to be thought to diminish the jurisdiction and control which the Court has over trustees in exercising their discretion, but on the other

(1) (1878) 7 Ch. D. 754.
(2) (1879) 11 Ch. D. 272.
(3) (1883) 22 Ch. D. 521.
(4) [1894] 1 Ch. 324, 330-1.
(5) (1877) 2 App. Cas. 300, 307.
(6) (1882) 21 Ch. D. 571, 574.
(7) (1896) 41 Sol. J. 111.
(8) (1851) 3 Mac. & G. 440.

hand I should be loth to say that, where trustees have honestly exercised their discretion, the Court will interfere in the absence of special circumstances. Here the trustees are the Public Trustee and the testator's widow, and they have power to advance not more than a moiety of the capital of Madame Moro's settled share for her advancement and benefit, and the question is whether it will be for her benefit that the instalments of the legacy duty that have been paid and the two remaining instalments that are due should be paid out of the corpus instead of out of the income of her settled share. She is in difficulties owing to the times in which we are living. When the summons was previously before me I decided that the trustees could in the exercise of their discretion under the powers of advancement, if they thought fit, advance out of capital a sum sufficient to pay this legacy duty. The Public Trustee thinks that their discretion should be so exercised, but his co-trustee, the mother, declines to join him in so doing, not because she has considered whether or not it would be for her daughter's welfare that the advance should be made, but because her daughter has married without her consent, and her letters show, in my opinion, that she has not exercised her discretion at all. What, then, ought the Court to do when one trustee very properly desires to exercise his discretion under a power for the benefit of a beneficiary and his co-trustee will not exercise her discretion? I think that in such circumstances it is the duty of the Court to interfere and, in the exercise of its control over the discretion given to the trustees, to direct a sum to be raised out of the capital sufficient to pay off the mortgage of 250*l.* and two remaining instalments of the legacy duty, and that is the order I now make.

Solicitors: *Freshfields; Eardley Holt, Lightly & Slater; Norman Hart.*

H. L. F.

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PETERSON J.
Feb. 7, 8, 13.
C. A.
April 22, 23.

In re BECKET.

PURNELL *v.* PAINE.

[1916 B. 2727.]

Solicitor—Action—Solicitor retained by Plaintiffs—Another Solicitor acting for Plaintiffs without their Authority or Knowledge—Claim for Costs—Retainer—Adoption—Ratification.

In 1907 the plaintiffs retained S. as their solicitor to conduct an action on their behalf. S. without their authority or knowledge arranged with L., another solicitor, that L. should conduct the action, not as his agent, but as the plaintiffs' solicitor, and L. issued the writ and delivered the statement of claim in his firm's name. L. subsequently entered into negotiations with the defendants' solicitors with a view to a compromise of the action. Before the compromise was completed the plaintiffs, for reasons in no way connected with the action, declined to employ S. any longer as their solicitor and entrusted the conduct of the action and compromise to another firm of solicitors, and thereupon L. ceased to do any active work in the matter. In 1910 the compromise was completed, one of the terms being that the plaintiffs should bear their own costs. In 1912 the plaintiffs discovered that L. had acted in the action. In 1913 L. claimed payment of his costs by the plaintiffs :—

Held, by Peterson J. and the Court of Appeal, that there was no contract for services between L. and the plaintiffs and that L. had no authority for conducting the action as solicitor for the plaintiffs, and that on neither of those grounds, nor on any ground of adoption, ratification, or recognition of L. or his services by the plaintiffs, was L. entitled to payment of his costs by the plaintiffs.

Hall v. *Laver* (1842) 1 Hare, 571 ; (1838) 3 Y. & C. Ex. 191 ; (1840) 4 Y. & C. Ex. 216, explained.

Reynolds v. *Howell* (1873) L. R. 8 Q. B. 398 distinguished.

Gray v. *Wainman* (1823) 1 L. J. (O.S.) (C.P.) 21 commented on.

Adjourned Summons.

The plaintiffs were the present trustees of the will of C. A. Becket, the above mentioned testator, whose estate comprised a brewery originally leased to one George Wood, by whom the lease had been assigned to a company called George Wood & Son, Limited. Differences arose between the trustees and the company in connection with certain alleged breaches of covenants and conditions in the lease, and in 1907 C. F. Southgate, a solicitor carrying on business as Tufnell, Southgate & Son, was retained by the trustees for the purpose of conducting an action by them against the company with

a view to settling the differences. Southgate, without any authority from the trustees, arranged with another solicitor, a Mr. Lawson Lewis, that the latter should conduct the action as the plaintiffs' solicitor, not acting on the record as Southgate's agent but as the solicitor to the plaintiffs. The writ was issued and the statement of claim was delivered by Mr. Lewis's firm. Mr. Lewis discussed terms of settlement with the defendants' solicitors, a compromise was suggested, and negotiations with a view to a compromise took place. Before the compromise was actually completed the plaintiffs, for reasons in no way connected with the action or its conduct, declined to employ Southgate any longer as their solicitor, and thereafter Messrs. Nash, Field & Co. acted as their solicitors in the action.

In 1910, after the employment of Messrs. Nash, Field & Co. as such solicitors, and after, therefore, Mr. Lewis had ceased to do any active work in the matter, an agreement for compromise was entered into, subject to the sanction of the Court, for the sale of the brewery by the plaintiffs to the company. Clause 9 of the agreement provided that "the company shall pay and bear the costs of the directors, and the vendors and the company respectively shall bear their own costs of and incidental to the said action (including any costs directed in the action to be paid in any event to any of the parties) and the preparation engrossment execution and stamping of these presents," and clause 11 provided that "except so far as may be necessary for the purpose of carrying these presents into effect, the action of *Purnell* v. *Wood* shall be stayed."

In July, 1910, an order was made in the matter of the testator's estate sanctioning the agreement, and Messrs. Nash, Field & Co. acted as the plaintiffs' solicitors in completing the compromise and in the conveyance of the property.

Southgate died on November 15, 1912.

From the evidence it appeared that the plaintiffs knew nothing whatever of Mr. Lewis until they saw a letter, dated November 29, 1912, written by Messrs. Nash, Field & Co. to Messrs. Hemsley & Co. (who were then acting for the plaintiffs in the matter of the testator's estate), in which the former stated that Mr. Lewis had acted in the action as agent for Southgate.

In 1913 Mr. Lewis set up a claim against the plaintiffs for the costs of the action and carried in his bill for taxation. The objection

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was taken that he had no retainer from the plaintiffs. The taxing Master, considering the objection good, adjourned the taxation for Mr. Lewis to take proceedings to establish his claim against the plaintiffs. Mr. Lewis did not take any such proceedings, but in 1916, when the estate became distributable, gave notice to the plaintiffs, the trustees, not to distribute without providing for payment of his costs.

This was a summons by the trustees which (inter alia) raised the question whether Mr. Lewis was entitled to be paid the costs in question. The summons came on for hearing before Peterson J. on February 7, 1918.

Clayton, K.C., and *Bryan Farrer*, for the applicants. The evidence shows no retainer whatever of Lewis as solicitor and the plaintiffs are not responsible or liable to him in any way. The employment of Lewis by Southgate as his agent did not make the former the solicitor of the plaintiffs: *Wray* v. *Kemp*. (1) That was a case of a country solicitor and his London agents, but the present is an à fortiori case, because both were London solicitors. The agent of the solicitor is not the solicitor of the client, nor is he entitled to a charge for costs: *Macfarlane* v. *Lister*. (2)

The plaintiffs did not know until two years afterwards that the work had been done by Lewis, and *Falcke* v. *Scottish Imperial Insurance Co*. (3) affords an answer to any suggestion of an implied request on the part of the plaintiffs for Lewis to act for them.

Maugham, K.C., and *Harman*, for the defendant Lewis. The plaintiffs cannot take advantage of the work done by Lewis and not pay for it. They knew of the action, and they assented to the compromise and completed the sale, both of which were mainly negotiated by Lewis. No step was taken as in *Wray* v. *Kemp* (1) to stop Lewis doing the work. As the plaintiffs have availed themselves of the benefit of Lewis's services and work, they must pay for them: *Hall* v. *Laver*. (4) They could not, as sensible men, have supposed that his services were being given gratuitously, and a contract to pay for them must be implied: *Blyth* v. *Fladgate*. (5)

(1) (1884) 26 Ch. D. 169.
(2) (1887) 37 Ch. D. 88.
(3) (1886) 34 Ch. D. 234.
(4) 1 Hare, 571.
(5) [1891] 1 Ch. 337, 358.

In compromising the action upon terms which provided that the plaintiffs should bear their own costs and that the action should be stayed the plaintiffs must be taken to have adopted all that had been done on their behalf in that action.

In the circumstances we submit that there was a clear ratification and recognition by the plaintiffs of the work done for them by Lewis and that he is entitled to his costs.

Bryan Farrer in reply.

F. A. Milne, for another defendant.

Cur. adv. vult.

Feb. 13. PETERSON J. stated the facts as above set out, and continued : On the evidence it is clear that the plaintiff trustees did not know that Mr. Lewis had purported to act for them and had not given any authority to Mr. Southgate by which the latter was enabled to instruct Mr. Lewis to take proceedings on behalf of the plaintiffs. In these circumstances, has Mr. Lewis any claim against the trustees or the proceeds of sale of the brewery company for the amount of his costs ?

There was no contract between Mr. Lewis and the plaintiffs for the rendering of service on the one hand and for payment on the other, and it is plain that Mr. Lewis had no authority whatever for commencing the action as solicitor for the plaintiffs : *Wray* v. *Kemp.* (1) He had therefore no right to sue the plaintiffs for costs incurred in consequence of any retainer or contract entered into prior to the costs being incurred. Nor if he had applied for a charging order, would he, in my opinion, have succeeded, as a charging order under s. 28 of the Solicitors Act, 1860, can only be made in favour of a solicitor who has been " employed " to take or defend proceedings, and " employed " means " employed by the client " : see *Macfarlane* v. *Lister* (2) ; and the plaintiffs never even knew of Mr. Lewis's existence before 1912.

The argument, however, for Mr. Lewis was that the plaintiffs could not take the benefit of the action against the brewery company and of the negotiations for a compromise without bearing the costs occasioned by them ; and for this proposition reliance was placed on *Hall* v. *Laver.* (3) As appears from the report of this action in

(1) 26 Ch. D. 169. (2) 37 Ch. D. 88.
(3) 1 Hare, 571, 575.

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Younge and Collyer's Exchequer Reports (1), the solicitor had commenced an action for specific performance in the name of the trustee Hall and various beneficiaries, some of whom he had joined without any authority or retainer from them, but he had the necessary retainer from other defendant beneficiaries, and, I gather, also from the trustee. The question was whether he had a lien on the funds recovered by means of the action, which were in Court, as against those beneficiaries who had not employed him. Alderson B. held that he had, and what the Vice-Chancellor said (2) in the passage on which reliance was placed was based on the existence of that lien. Now if a solicitor, acting for a client, succeeds in recovering a fund in which some other person is interested, he has a lien and can obtain a charging order under the Act of 1860 over the whole of the fund; and prior to that Act he had a lien over property recovered in which persons other than his client were interested, with the exception that previous to the Act of 1860 the lien did not extend to real estate recovered. But before he has such a lien he must have been "employed" by a client. In my view, then, *Hall* v. *Laver* (2) is merely an instance of a solicitor, who has been properly retained by a client, being held entitled to a lien over property recovered in which persons other than his client are interested; and it is plain that both Alderson B. and the Vice-Chancellor were of opinion that, as there was no contract between the solicitor and the beneficiaries for whom he had not authority to act, the solicitor had no personal claim or personal remedy against them. In my view, then, this contention on the part of the defendant fails.

But it was suggested that the plaintiffs adopted the action by compromising it on terms which provided that they should bear their own costs of the action and of the compromise and the negotiations leading up to it, and that the action should be stayed except so far as might be necessary for carrying the compromise into effect. It is to be observed, however, that the provision that the plaintiffs should bear their own costs only means that they should pay such costs as they might be liable to pay; and, as to the provision for staying the action, it would be very difficult to hold that a plaintiff, who became aware that a solicitor without any authority had been conducting an action in his name, adopted the previous acts of the

(1) 3 Y. & C. Ex. 191; 4 Y. & C. Ex. 216. (2) 1 Hare, 571, 575.

solicitor and became liable for the costs incurred by the solicitor because he insisted that the action which was improperly brought in his name should come to an end.

The phrase "adopting an action" is a loose and inaccurate expression which really means adopting the acts done in connection with an action by some person who has professed to act on behalf of the plaintiff or the defendant as the case may be. It is the acts of the professed agent which may be adopted. Now, to use the words of Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (1), "There is no such thing in law as adopting or ratifying anything except where there is the sanctioning of an act professedly done on your behalf in such a sense as to make you liable for it."

The question, then, appears to me to be whether there is anything in the present case which amounts to a ratification by the plaintiffs of the acts of Mr. Lewis purporting to act as their solicitor, or is there anything which shows that the plaintiffs recognized that Mr. Lewis was acting as their agent. In face of the fact that they did not know of his existence until 1912, and that they thought that the action was being conducted by Mr. Southgate, it is, I think, impossible to come to the conclusion that they agreed to treat Mr. Lewis's assumption of the position of solicitor for them as valid, or that, as between them and him, he should be deemed to have acted as their authorized agent throughout. I am therefore of opinion that Mr. Lewis's claim fails.

R. M.

C. A.

Lewis appealed. The appeal was heard on April 22, 23, 1918.

Maugham, K.C., and *Harman*, for the appellant. The action was a beneficial one and resulted in obtaining a considerable sum for the trust estate, and it is inequitable, therefore, that the estate should not pay the costs. Retainer is no more than an authority given to the solicitor. It need not be in any particular form, and may be given ex post facto.

[SWINFEN EADY L.J. You are asking for payment of costs which, if payable to Southgate, the respondent trustees would have a set-off against.]

It is submitted that the respondent trustees have adopted the

(1) 34 Ch. D. 234, 250.

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action. If a plaintiff recognizes the action as his and applies for a stay it is immaterial by whom the action was commenced. The respondent trustees have recognized that the action was brought on their behalf, and that is a recognition that the agent acted for them. It is not a case of sub-contract. When Southgate asked Lewis to act he did not ask him to act for himself, but for the trustees. How could the trustees obtain an order staying the action without recognizing that the action was theirs? It is not suggested by the trustees that there was any concealment by the appellant Lewis or that he did not act in perfect good faith. On the facts it is submitted there was ratification. In *Wilson* v. *Tumman* (1) Tindal C.J. said "That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority." The facts of this case bring it within that proposition: see also *Gray* v. *Wainman* (2) and *Reynolds* v. *Howell* (3), which are illustrations of the same proposition.

[BANKES L.J. How can you be said to adopt an act when you cannot help yourself?]

When the papers were taken over from Lewis the trustees must be taken to have known that Lewis had done the work and to have adopted it.

Clayton, K.C., and *Bryan Farrer*, for the respondent trustees, and *F. A. Milne*, for another respondent, were not called upon.

SWINFEN EADY L.J. This is an appeal of the defendant Lewis from an order of Peterson J., the effect of which is that an estate may be divided without making provision for his claim. Mr. Lewis contends that he has a claim against the trustees for costs, and that they have no right to divide the estate until they make provision for his claim.

(1) (1843) 6 Man. & G. 236, 242. (2) 1 L. J. (O.S.) (C.P.) 21.
(3) L. R. 8 Q. B. 398.

The matter arises in this way. The plaintiffs, the trustees, had, or conceived they had, a claim against a brewery company, and instructed their solicitor, Mr. Southgate, to bring an action in respect of it. It is alleged that Mr. Southgate is indebted to the trustees. Mr. Southgate did not bring the action in his own name as solicitor, but without obtaining the authority of the trustees he employed Mr. Lewis to bring the action. The trustees were not aware of this. Mr. Lewis brought the action in the name of the trustees and it proceeded up to a point. There were then negotiations for a settlement of the action and other matters, and the result of the settlement was that the plaintiff trustees agreed to sell the property in respect of which they were suing to a company, and they received 41,000*l.* in satisfaction of their claim. It is said that Mr. Lewis negotiated the settlement of the action. A draft deed or agreement of compromise was prepared, and it was finally accepted by Messrs. Thompson & Young on behalf of the defendant company and the directors on April 26, 1909. The terms of compromise were thus settled, involving the sale by the plaintiff trustees of the property of which they were trustees. Then an order was made on July 14, 1910, by which all further proceedings in the action were stayed. The terms of compromise provided that the plaintiffs, the vendors, should bear their own costs, so that the effect of that order was that the action was stayed, the plaintiff trustees bearing their own costs, and it was also part of the terms of compromise that where costs had been given to either party in any event they were still to bear their own costs. The result of that was that the plaintiffs received nothing for costs in respect of any order for payment of costs to them. For more than two years after the date of the order of July 14, 1910, sanctioning the compromise the plaintiffs were unaware that Mr. Southgate had not acted as their solicitor throughout the proceedings. He first employed Mr. Lewis to bring the action: Mr. Lewis brought it and continued it down to some date; the exact date does not appear. Mr. Harman has suggested it was April 26, 1909; it may have been that date or some other date, but we are not told what the date is. Then at some date Mr. Southgate ceased to employ Mr. Lewis and employed Messrs. Nash, Field & Co., but the fact that any one other than Mr. Southgate had been acting for the plaintiffs did not become known to the plaintiffs

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until a letter was written on November 29, 1912, from which they first became aware that Mr. Southgate had not been acting in the action, and we now know that Mr. Lewis had so acted. Upon those facts there was no retainer of Mr. Lewis by the plaintiffs.

Then Mr. Harman has urged that the plaintiffs voluntarily adopted the work of Mr. Lewis and cannot accept the benefit of it without becoming liable for the burden of paying for it. There is no question of adopting the action. So far from adopting it, they did nothing of the kind in the action, because in July, 1910, the action was stayed and there was an end of it. Then it is said the fruit of the agreement was the terms of the compromise, and they adopted that. How could they help themselves? They had sold their property in consideration of receiving debentures in the company, and they could not get their property back. Of course they could not relinquish the debentures and abandon them. It is not a question of coming in and voluntarily adopting an action. Then behind it all there is this—I will not put it higher than a suggestion, because we have not yet fully heard the other side with regard to what the position really is as between the trustees and Mr. Southgate—but their case is, as I gather from interlocutory observations, that Mr. Southgate is indebted to them, and that if they owe costs to Mr. Southgate they have a larger contra-claim against him in respect of his indebtedness to them, and that it would be a curious equity if Mr. Lewis could come in as if he were Mr. Southgate and get paid the costs of the action whilst not being bound by the position in which Mr. Southgate would have been if he had claimed in respect of costs by reason of his liability to the plaintiff trustees.

With regard to the authorities cited, *Gray* v. *Wainman* (1) is not very clearly reported. I gather that the claim was for some extra costs in Chancery suits, and it was contended that these costs were properly a burden on all the beneficiaries for obtaining what all the beneficiaries were held to be entitled to ultimately, and it was decided that the husband of one lady, a beneficiary who was a party to the action, could not come in and claim as her husband the benefit of the action without bearing his proportion of the costs proportionate to the share. As to the other case, *Reynolds* v. *Howell* (2), it is clear that if a plaintiff, knowing that an action is brought in

(1) 1 L. J. (O.S.) (C.P.) 21. (2) L. R. 8 Q. B. 398.

his name, not having authorized it, does not repudiate it, he may be supposed to have ratified the action. This is not a case of that kind, it is not a case in which the plaintiffs were not aware of an action having been brought; they directed the action to be brought, and they believed that it was being brought by Mr. Southgate.

Then Mr. Harman further urged this. He said that the plaintiffs knew by their agent, Mr. Southgate, that Mr. Lewis had done the work, and by the same agent they took advantage of Mr. Lewis's work and must pay for it. The fallacy of that is in assuming throughout that Mr. Southgate was their agent for this purpose, their agent first to do the work, and secondly their agent in adopting work of Mr. Lewis. He was nothing of the kind. The plaintiffs from the beginning to the end were under the impression that in accordance with their instructions Mr. Southgate was acting as their solicitor. In my opinion the case may very shortly be put in this way. It is a case in which the appellant, not having been retained as a solicitor, seeks to be put in the same position as if he had been duly retained. In my opinion Mr. Lewis's claim is unfounded. It has no validity either in law or in equity, and the learned judge below was right in directing the estate to be distributed without any provision being made for the satisfaction of Mr. Lewis's claim. In my opinion the appeal fails and must be dismissed with costs.

BANKES L.J. I agree.

NEVILLE J. I agree.

Appeal dismissed.

Solicitors: *Hemsley & Co.; P. F. Walker; Wedlake, Letts & Birds, for Boyes & Son, Barnet.*

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[1917 W. 527.]

Will—Soldier on Active Service—Infancy—Exercise of Power of Appointment—Validity—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 23—*Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 7, 11, 27—*Wills (Soldiers and Sailors) Act*, 1918 (7 *& 8 Geo.* 5, *c.* 58), *s.* 1.

Sect. 7 of the Wills Act, 1837, enacts that no will made by any person under twenty-one shall be valid. Sect. 11 provides that any soldier being in actual military service may dispose of his personal estate as he might have done before the Act. By s. 27, "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will":—

Held, that the combined effect of ss. 11 and 27 was to preserve to infant soldiers in actual military service the power which they previously possessed of exercising a general power of appointment over personal estate by will.

A. P. W., having under his father's will a general power to appoint 1,000,000*l.* by will, made a will in 1916, when on active service, purporting to exercise the power, and was killed in action when an infant between nineteen and twenty years of age:—

Held, that the will operated as a valid exercise of the power.

Decision of Younger J. [1918] 1 Ch. 339 affirmed.

APPEAL from a decision of Younger J. (1)

Sir Julius Charles Wernher, by his will dated December 23, 1911, amongst many legacies and other gifts of large amount, by clause 26 bequeathed to his trustees a sum of 1,000,000*l.*, therein referred to as "the third settled legacy," upon trust for investment, declaring that, so long as his son Alexander Piggott Wernher should be living and under the age of twenty-six years, the income of the whole of the sum of 1,000,000*l.* constituting the legacy and of the investments from time to time representing it, and so long as the same son should

(1) [1918] 1 Ch. 339.

be living and above the age of twenty-six years but under the age of thirty years the income of one moiety of that third settled legacy, should sink into and form part of his residuary estate. And he declared that his trustees should, after the attainment by his son of the age of twenty-six years, pay the income of one moiety of the third settled legacy to him until he should attain the age of thirty years or previously die, and that after the attainment by his son of the age of thirty years they should pay the income of the third settled legacy to him for the remainder of his life. And the testator proceeded as follows: "And I declare that after the death of my said son Alexander Piggott Wernher my trustees or trustee shall stand possessed of the third settled legacy and the income thereof in trust for such person or persons and for such purposes as the said Alexander Piggott Wernher shall by will or codicil appoint and in default of appointment and so far as no such appointment shall extend the third settled legacy shall sink into and form part of my residuary estate." By the conjoint operation of his will and of a codicil thereto dated March 15, 1912, any further sums falling into the residue of Sir Julius Wernher's estate would devolve as to two twenty-fourths upon the defendants King Edward's Hospital Fund for London, as to thirteen twenty-fourths upon the plaintiff Lady Wernher, and as to nine twenty-fourths upon Sir Julius' second son, the plaintiff Major Harold Augustus Wernher. That son's interest in his share of residue, however, did not vest in him until he attained the age of thirty years. In the event of his earlier death leaving issue surviving him, that issue on attaining twenty-one, or in case of females on marriage, would take his share by way of substitution, and if more than one equally between them. Major Wernher was now twenty-five. He was married, but there was at present no issue of his marriage. Sir Julius Wernher died on May 21, 1912, and his will and codicil were in due course proved by two of the plaintiffs and by the defendants Mr. Beit and Mr. Pollen. Alexander Piggott Wernher by his will dated July 14, 1916, and made by him when "in actual military service" within the meaning of s. 11 of the Wills Act, 1837, by clause 3 gave pecuniary legacies amounting in all to 328,000*l.* Amongst these was a legacy of 50,000*l.* to the defendant Ernest Trevor McDougal. By clause 4 he devised and bequeathed "all the real and personal estate whatsoever and

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wheresoever of or to which I shall at my death be seised possessed or entitled or over which I shall at my death have a general power of appointment or disposition by will"; and, except so far as the same was not otherwise thereby disposed of, he gave it, in the events which happened, unto and to the use of the plaintiff his brother Harold Augustus Wernher. He died, being killed in action, in September, 1916, when an infant between nineteen and twenty years of age. He was a bachelor at his death. Probate of his will was on February 7, 1917, granted to the plaintiffs, three of the executors therein named, power being reserved to the fourth executor, the defendant Stephen Hungerford Pollen, to prove. He had not yet done so. The testator's own personal estate amounted to about 400*l.* only. He was not possessed of any real estate. The third settled legacy was in substance the only property dealt with by the will.

The present summons was taken out by the plaintiffs as executors of the will of Lieutenant Alexander Piggott Wernher for the determination by the Court of the question whether that will operated to exercise the general testamentary power of appointment over the legacy of 1,000,000*l.* conferred upon the testator by the will of his father, Sir Julius Charles Wernher.

On January 15, 1918, Younger J. delivered a considered judgment in which, after expressing the opinion that a will made by an infant soldier in actual military service disposing of his personal property was not valid, having regard to s. 7 (1) of the Wills Act, he nevertheless held that inasmuch as the will had been admitted to probate it must so long as the probate remained unrevoked be

(1) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 7: "No will made by any person under the age of twenty-one years shall be valid."

Sect. 11: "Provided always, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

Sect. 27: ". . . . and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

treated as valid, and that it therefore operated as a valid execution of the power.

In consequence of this expression of opinion by the learned judge a clause to set this doubt at rest was inserted in the Bill which was then before Parliament and which ultimately became the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58), and received the Royal assent on February 6, 1918. By s. 1 of that Act it is now provided that "In order to remove doubts as to the construction of the Wills Act, 1837, it is hereby declared and enacted that section eleven of that Act authorises and always has authorised any soldier being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, though under the age of twenty-one years."

The defendants, the executors and trustees of the will of Sir Julius Charles Wernher, appealed.

The appeal was heard on April 19, 20, 1918.

Maugham, K.C., and *Galbraith*, for the appellants. The only question is whether the will of the infant testator operated as a valid exercise of the power of appointment. Before the Wills Act, 1837, a soldier's or sailor's will could not operate as a valid exercise of a power of appointment by will. Such a will could only operate to pass the testator's own personal estate. A fortiori s. 11 of the Act only empowered a soldier in actual military service to dispose of his own personal estate. The property forming the subject of this power was never the property of the infant testator in this case. According to the true construction of the will of Sir Julius Wernher there is every indication of the testator's intention that the infant should not be able to exercise the power before he became entitled to an interest in the fund. The validity of the will is not now disputed, but it is submitted that it cannot affect property which was not the infant testator's own personal estate. As regards the appointed property the will is a nullity. It is not sufficient to say that Lieutenant Wernher had power to appoint by will and that this is a will. It is a will, but it is not a will of the personal estate of somebody other than the testator. On the construction of the clause in Sir Julius Wernher's will creating the power what was meant by a will was a will made in the ordinary way by a person of

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full age and executed in the usual form, and not such a will as that now in question. Sect. 7 of the Wills Act is a general prohibition against the making of wills by infants. Sect. 11 is a saving clause, but only operative to a limited extent in regard to a limited class of persons.

[SWINFEN EADY L.J. Does not the clause creating the power amount to a declaration by Sir Julius Wernher that whenever by ordinary law the donee could make a will he was to have authority to exercise the power ?]

It is submitted that it means that he should have that authority whenever by ordinary law he could make a will disposing of property which was not his own.

Reading the definition section (s. 1) of the Wills Act with ss. 7 and 11 the effect is this : No will or appointment by will made by a person under the age of twenty-one is valid ; but (s. 11) this is not to prevent any soldier in actual military service from disposing of his own personal estate as he might have done before the passing of the Act. The privilege never extended to the exercise of powers. The liberty saved by s. 11 is only to dispose of the soldier's own property, so that an infant soldier cannot exercise a general testamentary power. Sect. 27 of the Wills Act does not extend the operation of s. 11. Younger J. was wrong in holding that a privileged will can be recognized as exercising a general power of appointment by will : *Drummond* v. *Parish.* (1) Prima facie as a result of s. 7 and *In re D'Angibau* (2) no infant has power to exercise a power over personal estate. The only capacity saved by s. 11 is to deal with his own personal estate.

In the interpretation clause (s. 1) of the Act the words " personal estate " are defined to extend to " leasehold estates and other chattels real, and also to monies, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein." Personal property appointed by will in exercise of a general power is not the property of the appointor : *Platt* v. *Routh* (3) ; *Drake* v. *Attorney-General* (4) ; *O'Grady* v.

(1) (1843) 3 Curt. 522, 531.
(2) (1880) 15 Ch. D. 228.
(3) (1840) 6 M. & W. 756.
(4) (1843) 10 Cl. & F. 257, 276.

Wilmot (1); *Fleming* v. *Buchanan.* (2) [They also referred to Swinburne on Testaments and Last Wills, 1st ed., s. 14, p. 29; 7th ed. p. 114; Steph. Com., 8th ed. vol. ii. p. 179; 15th ed. vol. ii. p. 270.]

C. J. Mathew, K.C., and *J. W. M. Holmes*, for the respondent executors of Lieutenant Wernher's will, took no part in the argument.

Micklem, K.C., and *J. E. Harman*, for the respondent Captain McDougal, a legatee under that will. It is submitted that it is sufficient for the present purpose for the legatee to produce the probate of the infant's will. Probate is conclusive evidence that the will is a valid will: *In the Goods of Farquhar* (3); *D'Huart* v. *Harkness.* (4) Production of the probate is sufficient proof of the valid execution of the power: *Douglas* v. *Cooper* (5); *In re Simpson.* (6) By s. 23 of the Statute of Frauds (29 Car. 2, c. 3) it is provided that "notwithstanding this Act any soldier being in actuall military service or any marriner or seaman being at sea may dispose of his moveables, wages and personall estate as he or they might have done before the makeing of this Act." That Act dealt with both real and personal estate. Under that Act a soldier was, as regards personal estate, in exactly the same position as he was before the Act. It is clear that after that Act and until the passing of the Wills Act of 1837 a soldier, if over fourteen years of age, had power to dispose of all his personal estate. The language of s. 11 of the Wills Act follows the language of s. 23 of the Statute of Frauds.

The Court must not, it is submitted, be held bound by the definition of personal estate in the definition clause of the Wills Act if it is ambiguous. The clause only defines the distinction between what is real and what is personal estate. It does not distinguish between personal estate and personal estate over which a person has a power of appointment. The Wills Act deals only with formalities for adults, and not with capacity. It was not intended to be a disabling Act for soldiers. The words "his personal estate" in s. 11 are ambiguous: they may mean his personal estate as distinguished from his real estate. It is submitted that they include personal estate over

(1) [1916] 2 A. C. 231, 246.
(2) (1853) 3 D. M &. G. 976, 979.
(3) (1846) 4 Notes of Cases, 651.
(4) (1865) 34 Beav. 324, 327.
(5) (1834) 3 My. & K. 378.
(6) [1916] 1 Ch. 502, 510.

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which he exercises a general power of appointment by will. As to the meaning of "my personal estate," see *Chandler* v. *Pocock.* (1) Personal estate over which a person exercises a general power of appointment by will is treated as personal estate bequeathed by him and becomes available for the payment of his debts: *Beyfus* v. *Lawley* (2); *Lassells* v. *Cornwallis* (3); *Lord Townshend* v. *Windham.* (4) It is well settled that where a donee of a general power of appointment over a fund of personalty makes an appointment of the fund by will and appoints an executor, the executor is entitled to receive the appointed fund: *In re Hoskin's Trusts.* (5)

[SWINFEN EADY L.J. Have any cases arisen in which a soldier's will has been held to exercise a power of appointment?]

Only *In the Goods of Farquhar* (6) and *In the Goods of M'Murdo.* (7) [They also referred to *Arthur* v. *Bokenham.* (8)]

Galbraith in reply referred to *Commissioner of Stamp Duties* v. *Stephen.* (9)

Cur. adv. vult.

April 24. SWINFEN EADY L.J. read the following judgment:— The point raised by this appeal is whether the will of Alexander Piggott Wernher operates as a valid exercise of a power of appointment over a sum of 1,000,000*l.* sterling given to him by the will of his father, Sir Julius Wernher. The power is conferred by clause 26 of that will, which is as follows: [His Lordship read the clause, and continued:]

Sir Julius Wernher died on May 21, 1912, and his will, with a codicil, has been duly proved. Alexander Piggott Wernher joined His Majesty's Forces, and when "in actual military service," within the meaning of s. 11 of the Wills Act, 1837, made his last will, dated July 14, 1916, in which he is described as "a Lieutenant in His Majesty's Welsh Guards now on active service." By clause 3 of the will he gave various pecuniary legacies, some of considerable amount. Clause 4 of the will is as follows: "I devise and bequeath

(1) (1880) 15 Ch. D. 491; on appeal, (1881) 16 Ch. D. 648.
(2) [1903] A. C. 411, 413.
(3) (1704) 2 Vern. 465.
(4) (1750) 2 Ves. Sen. 1, 9.
(5) (1877) 6 Ch. D. 281.
(6) 4 Notes of Cases, 651.
(7) (1867) L. R. 1 P. & M. 540.
(8) (1707) 11 Mod. 148, 149.
(9) [1904] A. C. 137, 140.

all the real and personal estate whatsoever and wheresoever of or to which I shall at my death be seised possessed or entitled or over which I shall at my death have a general power of appointment or disposition by will and which is not otherwise disposed of by this my will or any codicil hereto unto and to the use" (in the events which have happened) "of my said brother Harold Augustus Wernher. . . . ." The will is a formal document and was executed in the presence of two witnesses and attested by them. Lieutenant Wernher was killed in action in September, 1916, when an infant between nineteen and twenty years of age. He died a bachelor. Probate of his will was granted to the plaintiffs on February 7, 1917. He was not entitled to any real estate, and his own personal estate amounted to about 400*l.* only.

The first objection taken in the Court below to the validity of the will was that, having regard to s. 7 of the Wills Act, no will made by an infant soldier was of any validity whatever. The judge acceded to this view, and suggested that an application should be made to the Probate Division to revoke the probate; but also held that while probate of the will remained unrevoked it was conclusive as to the testamentary capacity of Lieutenant Wernher to dispose of his own personal property.

It is not necessary for this Court to consider whether the opinion of the learned judge, that the will of an infant soldier was not of any validity, was well founded, as any doubt which may have existed on this point is entirely removed by s. 1 of the Wills (Soldiers and Sailors) Act, 1918, passed on February 6, 1918, after the date of the judgment below. That section is as follows: [His Lordship read the section, and continued:] It follows from this provision that the contention that no will of an infant soldier is valid cannot be supported, and accordingly probate of Lieutenant Wernher's will was properly granted, and the fact that he was an infant when he made his will is no ground for revoking the probate. The appellants, however, contend that the will, although certainly valid now to dispose of Lieutenant Wernher's own personal property, is ineffective as an exercise of his power of appointment. They argue that s. 11 of the Wills Act, as explained by the recent Act, only qualifies the general language of s. 7 of the Act, so far as it enables an infant soldier to dispose of "his personal estate" (meaning his own

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personal estate) as distinguished from personal estate not his property, but only subject to his power; and they contend that s. 7 precludes an infant soldier from appointing personal property by will, because such an appointment is not a disposition of "his personal estate" within the meaning of s. 11. In my opinion this argument fails.

The language of s. 11 of the Wills Act obviously follows the language of s. 23 of the Statute of Frauds. That statute drew a distinction between devises of land and bequests of personal property. By s. 5, all devises of lands were to be in writing and signed by the party devising the same, or by some other person in his presence and by his express directions, and were to be attested and subscribed by three or four credible witnesses, or else were to be utterly void and of no effect. The Statute of Frauds did not, however, require that a will of personal estate must be in writing. The effect of s. 23 of the Act is to preserve to soldiers in actual military service the power of disposing of their personal estate, as they might have done before the Act, but it does not in their case dispense with the new formalities required in a devise of lands.

The expression contained in s. 23 of "his moveables, wages, and personal estate" is directed to confine this exception of soldiers' wills to personal estate, as distinguished from land, and is not directed to any distinction between the soldier's own personal property and personal property over which he has a general power of appointment, and which by exercising the power he makes available for payment of his debts. See *Fleming* v. *Buchanan* (1) and *Beyfus* v. *Lawley*. (2) In the latter case Lord Lindley in referring to property appointed by will under a general power said: "The property appointed is in such a case treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him. When I say assets I do not mean general assets, but assets nevertheless applicable to the payment of the appointor's debts after all his own property has been exhausted. Again, personal property appointed by will under a general power although not a legacy for all purposes is treated as personal estate bequeathed by him." See also for the meaning of "my personal estate," *Chandler* v. *Pocock*. (3) The definitions in s. 1 of the Wills Act

(1) 3 D. M. & G. 976. (2) [1903] A. C. 411, 413.
(3) 15 Ch. D. 491; 16 Ch. D. 648.

of the words "real estate" and "personal estate" are directed to the distinctions between these two classes of property, and as regards personal estate are not directed to the distinction between property and power. The language is: "The words 'personal estate' shall extend to"—that is shall include, and not shall be limited to.

Moreover, in considering the effect of a testator disposing by will of his personal estate regard must also be had to s. 27 of the Wills Act. This section provides that—"A bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." No such contrary intention appears in the will of Lieutenant Wernher, but, on the other hand, there is manifested and expressed a clear intention of exercising every general power of appointment which he possessed. Sect. 27 is applicable to all valid wills containing a bequest of the personal estate of the testator, and there is no ground for excluding the will of an infant soldier containing such a bequest.

Again, upon the true construction of the will of Sir Julius Wernher, I am of opinion that the power conferred by clause 26 upon Lieutenant Wernher to appoint by will or codicil is thereby conferred upon him whenever he should be of testamentary capacity to make a will or codicil.

A power to appoint by will may be validly exercised by an infant if an infant can make a valid will. In *In re Cardross's Settlement* (1) it was held by Jessel M.R. that an infant could exercise a power even though it be coupled with an interest, when an intention appears that it should be exercisable during minority. Indeed, the argument of the appellants was that s. 7 of the Wills Act took away from an infant soldier as well as from other infants the power which they previously possessed of appointing personal estate by will: see *In re D'Angibau.* (2) In my opinion this right was preserved to infant soldiers by the combined effect of ss. 11 and 27.

In arriving at this conclusion I fully bear in mind the distinction

(1) (1878) 7 Ch. D. 728. (2) 15 Ch. D. 228.

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between property and power, and also the fact that property appointed does not pass to the executor "as such" (*O'Grady* v. *Wilmot* (1)), although the executor is entitled to receive and can give a good receipt and discharge for the amount: *In re Hoskin's Trusts.* (2)

Again, if the contention of the appellants were correct, a soldier even of full age could not appoint personal property by an informal will. The Wills Act requires a will to be attested by two witnesses, and if the privileges of soldiers are only preserved with regard to their own personal property, an appointment by a soldier by an unattested will would fail, although the instrument creating the power only required an appointment "by will," and although an unattested will of a person domiciled abroad, and valid by the law of such person's domicil would have been in such a case an effective appointment: *In re Price.* (3)

Again, the new Act by s. 3 extends the power of soldiers to dispose of real estate either by devise or appointment, although under twenty-one years of age, where the disposition would have been valid if of personal estate. It would be strange if in such circumstances an infant soldier could not validly appoint personal estate over which he had a general power of appointment.

In my opinion the appeal fails and should be dismissed.

BANKES L.J. I agree. The question in this appeal is whether the will of Lieutenant Wernher, who was killed in action, operated as a valid exercise of a general testamentary power of appointment over a legacy of 1,000,000*l.* conferred upon the testator by the will of his father, Sir Julius Charles Wernher. The power was created in clause 26 of Sir Julius's will, and the only direction he gave was that the appointment, to be a valid exercise of the power, must be by will or codicil.

The first question is what was intended and contemplated by the testator by the use of those words. It is obvious that he intended and contemplated that the power should be exercised by an instrument which should operate only upon the death of the donee, and he provided for that by the direction that it should be exercised by

(1) [1916] 2 A. C. 231. (2) 6 Ch. D. 281.
(3) [1900] 1 Ch. 442.

will or codicil. But what else did he contemplate ? It seems to me that, by the use of the words " will or codicil " simply, he intended nothing further than that the donee of the power should be of testamentary capacity, and that he should exercise the power by a testamentary instrument which complied with the requisites of the English law in reference to form and method of execution. As a matter of fact, Lieutenant Wernher did make a will, which was in form complete, and which was executed in accordance with the Wills Act, and that will was admitted to probate ; and, speaking for myself, I should be quite satisfied to decide this case upon the ground that the will, having been admitted to probate, was on the face of it, and without further inquiry, a sufficient compliance with the direction of Sir Julius's will. But another and further point has been argued, which has reference to the proper construction to be placed upon s. 11 of the Wills Act.

Younger J. has expressed a view with regard to the construction of the Act, upon which it is not necessary now to express any opinion, because whatever the real position may have been at the time his judgment was given, any doubt on that point has been removed by the recent statute, to which the Lord Justice has referred, the Wills (Soldiers and Sailors) Act, 1918 ; and therefore I say nothing on that point.

The argument for the appellants rests entirely upon the point that s. 11 uses the expression " his personal estate," and great emphasis is laid upon the word " his," and it is suggested that, when the section uses the expression " his personal estate," it is intended to draw a distinction between personal estate which belonged to a soldier testator and personal estate over which he had only a general power of appointment. In my opinion that is not the true construction to be placed upon the section. It seems to me that the words " his personal estate " are there used without it being intended that any special significance should be attached to the word " his," and merely with the object of drawing a very necessary distinction between real estate and personal estate. The reasons why I have come to that conclusion are these. First of all I am satisfied—and I think everybody is agreed upon that point—that s. 11 is an enabling section. It is not a section which creates for the first time a privilege in favour of a particular class, but, on

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the other hand, it is an enabling section introduced for the purpose of preserving a pre-existing privilege of soldiers and sailors. If the construction contended for by the appellants were correct, the effect of that section would be that, instead of being an enabling section preserving a pre-existing privilege, it would have the operation of cutting down the privilege existing before the passing of the statute. The second ground upon which I come to that conclusion is that as in s. 27 of the statute there is a direction that " a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper," it is manifest that the statute did not, and in fact the section expresses that it did not, intend to draw the distinction upon which the whole of the argument of the appellants rests. I should like just to give an illustration of the absurdity, if I may use the expression, of the appellants' contention, in the light of this section. Having regard to the provision of s. 27, if a testator merely made a bequest of all his personal estate, that would be construed to include any personal property over which he had a power of appointment ; but if instead of making a general bequest of his personal property an infant soldier was advised by some careful and competent person, not only to make a bequest of his personal property but in terms to exercise a general power of appointment, that, according to the appellants, would not be a valid exercise of the power.

On these short grounds it appears to me that this appeal fails.

NEVILLE J. I have arrived at the same conclusion, although I confess to having felt considerable difficulty in the course of the argument, owing to the character of the words used in s. 11 of the Wills Act. I think, however, that we may infer an intention on the part of the Legislature in that section to preserve the privileges of soldiers upon active service against the disabilities imposed by the Wills Act, and I say so because I think that, if there had been any real intention to distinguish between the personal estate of a soldier and the personal estate over which he had a power of appointment, there would inevitably have been found an express reference to such

a distinction, and it would not have been left to be inferred from the character of the words used in s. 11. The distinction between personal estate which a man can bequeath and personal estate which he can appoint by will as he pleases is an extremely subtle one, and, although for certain purposes it is necessary to bear the distinction between the two in mind, for practical purposes it does not seem an unlikely use of words that both classes of property should be referred to as " his personal estate." In the connection in which these words " his personal estate " are found in the Wills Act I think that they may well be construed as referring to both characters of property, both personal estate which a man may bequeath and personal estate which he may appoint, and I think that in giving that construction to the words used we are fulfilling the intention of the Legislature, as it is to be inferred both from the character of the matter dealt with and from the general purview of the Act.

Appeal dismissed.

Solicitors: *Holmes, Son & Pott; Robert Harradine; Charles Russell & Co.*

W. I. C.

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MEEK *v.* PORT OF LONDON AUTHORITY.

[1917 M. 1019.]

Master and Servant—Contract of Service—Trade Usage—Payment of Salaries free of Income Tax—Implied Term of Contract—Alteration of Usage by Master—Subsequent Promotion of Servant to higher Class at increased Wage—New Contract—Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *s.* 60.

Under s. 60 of the Port of London Act, 1908, servants of certain dock companies which by that Act were transferred to the Port Authority held their office upon like "terms and conditions" as under the transferred dock companies. The plaintiffs, who were transferred employees, had entered the service at a time when there was a trade usage by the dock companies to pay the income tax upon the salaries of such of their servants as were assessable thereto. At that time, having regard to the amount of their salaries, the plaintiffs were not so assessable. After the transfer, the Port Authority gave notice to discontinue the practice of paying income tax upon salaries. The plaintiffs were subsequently promoted by the Port Authority to higher grades of employment at increased salaries, and upon the passing of the Finance (No. 2) Act, 1915, they became assessable to income tax on the excess of their salaries over 120*l.* They claimed a declaration that the Port Authority were liable to pay the tax:—

Held, that the acceptance by the plaintiffs of promotion to a higher class of employment, with notice of the defendants' intention to discontinue the practice of paying income tax upon salaries, constituted a fresh contract of service, under which there was no obligation upon the defendants to pay the tax.

Decision of Astbury J. [1918] 1 Ch. 415 affirmed.

APPEAL from a decision of Astbury J. (1), where the facts are fully stated.

Under and by virtue of the Port of London Act, 1908, s. 3, the undertakings of the London and India Docks Company, the Surrey Commercial Dock Company, and the Millwall Dock Company were on March 31, 1909, transferred to the defendants, the Port Authority, and by s. 60 the plaintiffs, who were employees of the London and India Docks Company, became employees of the defendants. Sect. 60, sub-s. 1 (*b*), provides that every officer and servant of the several dock companies shall as from the appointed day (March 31, 1909) become an officer or servant of the Port Authority, and shall

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hold his office or situation by the same tenure and upon like terms and conditions (including all conditions regarding pension or other superannuation allowance) under the Port Authority as he would have held the same under the body from whom he is transferred if this Act had not been passed, and while performing the same duties shall receive not less salary, wages, or pay than he would have been entitled to if this Act had not been passed.

The London and India Docks Company had, in accordance with an established practice of the company and its predecessors, the London and St. Katharine Docks Company and the East and West India Dock Company, paid all income tax assessed or payable in respect of salaries and wages which at any time rendered an officer or servant liable to be assessed.

At the date of the transfer all the plaintiffs were receiving salaries or wages below 160*l.* a year, and were consequently not assessable to income tax.

On March 23, 1911, the defendants gave notice to their staff that they intended to discontinue the practice of paying the income tax on salaries and wages. On various subsequent dates three of the plaintiffs were promoted by the Port Authority to higher grades of employment at increased salaries or wages, while the fourth received an increase of wages as a matter of arrangement between him and the Port Authority, and upon the passing of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 21, they all became assessable on the excess of their respective incomes over 120*l.* They then applied to the Port Authority to pay their tax and, upon this being refused, they brought this action for a declaration that under s. 60 of the Act the Port Authority were liable to do so.

Astbury J. held (1.) that upon being promoted to higher grades with larger salaries and different incidents of employment the plaintiffs had entered into fresh contracts of service with knowledge that the Port Authority had discontinued the practice of paying income tax on the salaries and wages of their servants; (2.) that the payment of income tax was prima facie a bounty that could be discontinued; and (3.) that a trade usage of this character could not be annexed to a contract of service unless the servant was aware of it on entering the employment, and there was no evidence that

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the plaintiffs occupied that position at all. Upon these grounds he dismissed the action.

The plaintiffs appealed.

Romer, K.C., and *H. S. Preston*, for the appellants. Astbury J. was wrong in holding that the appellants when they accepted promotion or special increase of wages entered into new contracts of service with knowledge of the respondents' intention to discontinue the practice of paying income tax on salaries. Promotion under such circumstances does not involve a new contract. Each of the appellants was employed as a member of the staff with all the consequences of such an employment, including the expectation of advancement. Changes of grade are contemplated by the terms of the service, and the amount of salary is determined by the grade.

[The point, relied upon in the Court below, that the general trade usage of the dock companies to pay income tax on salaries was an implied term of the original contract, was not seriously argued upon the appeal.]

Hon. Frank Russell, K.C., and *Cecil Turner*, for the respondents, were not called upon.

SWINFEN EADY M.R. This is an appeal by four plaintiffs from the judgment of Astbury J. at the trial of the action. (1)

The short point which the appeal raises is whether the four plaintiffs, who are employees of the Port of London Authority, are entitled to be paid in addition to the salary or wages that they receive such an amount as will be equivalent to the income tax which from time to time they have to pay in respect of the income which they so receive. The ground upon which the action is based is that the plaintiffs were employees of one or other of the dock companies that were taken over by the Port of London Authority in 1909. Having regard to the terms upon which these several undertakings were transferred to the Port of London Authority, and especially having regard to s. 60 of the Act under which the transfer took effect, the plaintiffs say that in the events that have happened a sum equivalent to their income tax must be paid to them. They contend that they would have been entitled to receive it from one of the previous dock companies if the Act

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had not been passed, and that the Act preserves to them this right. As from the appointed day, March 31, 1909, the undertakings of the London and India Dock Company, the Surrey Commercial Dock Company, and the Millwall Dock Company were transferred to and vested in the Port Authority. [The Master of the Rolls then read s. 60 of the Act, and continued :] It is said, and rightly said, that that section preserves to the existing officers and servants under their employment by the Port Authority the old rights which they possessed under their previous contracts with the transferred dock companies. They are entitled to their salary, their wages, their pay in the same way as they would have been entitled if the Act had not been passed. Then the next step is this : it is said that it was the practice of these dock companies to pay in addition to salaries the income tax which their employees become liable for. It is not suggested that these particular employees, the four plaintiffs, when they were in the service of the old dock companies were in receipt of salaries which in those days would have rendered them liable to pay any income tax. None of the four plaintiffs in those days came under any liability to pay income tax in respect of his income ; but the case is that the practice of the dock companies was to pay the income tax on all the salaries of their employees who were subject to tax, and that when they for the first time came under liability to pay tax, then it was argued that if they had remained in the service of the dock companies under the old terms the practice of those companies to pay their income tax would have been extended to them, and they would have been entitled to receive in addition to their salaries amounts corresponding to the tax. The difficulty in the way of the plaintiffs in establishing their case is that with regard to all the plaintiffs they have not remained stationary in their employment. They have all proved themselves worthy of some improvement in their positions, and they have all been promoted, three to a higher position in a different grade, and one of them has received increased wages as a matter of arrangement between him and the Port Authority, and in no case has the increase to which I have referred been a consequence of a right under any pre-existing contract.

In my judgment it is clear that if an employee by the terms of his contract is entitled to receive remuneration at a progressive

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rate, on each occasion when his salary is thus increased there is not a new contract entered into. The increase is by virtue of his old pre-existing contract. But when, as here, the increase is not an increase automatically under an existing contract, but is an increase owing to the position of the employee being changed by the employers voluntarily promoting him to a higher grade, or, in one case, voluntarily making him an increase of salary, then the position is altogether different. In such case the employee having no right to promotion at any particular time but only a reasonable expectation that faithful service under the same employer will be duly rewarded, when he is promoted to a higher grade at a higher salary with different duties in law a new contract is entered into between himself and his employers. The employers offer him a better position and he accepts it, and under those circumstances, except so far as his duties are altered and his salary is increased, the old terms and conditions remain the same. That being his legal position, we have this, that the companies and the Port Authority unquestionably for a time and from time to time paid income tax on the remuneration of their employees; but a change was introduced in the month of March, 1911. On that occasion the Port Authority determined to discontinue the practice of paying the income tax on their employees' remuneration and gave notice accordingly. With regard to such of the existing employees as were liable to assessment, the Port Authority compromised, by an immediate payment, their right to have the tax paid. The position therefore was this: With regard to the four employees in question, new contracts were entered into by them at increased remuneration, but with full notice that the amount of the income tax in addition would not be paid by their employers. Under these circumstances I am of opinion that the plaintiffs cannot maintain this action. The appeal fails and must be dismissed.

WARRINGTON L.J. I agree.

DUKE L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Blunt & Co.*
Solicitors for respondents: *E. F. Turner & Sons.*

G. A. S.

Referred to. TAMLIN *v.* HANNAFORD [1950] 1 K. B. 18

CANNON BREWERY COMPANY, LIMITED *v.* CENTRAL CONTROL BOARD (LIQUOR TRAFFIC).

C. A. 1917 YOUNGER J. *May* 16; *July* 25, 31. C. A. 1918 *March* 22, 25; *May* 16.

[1916 C. 2749.]

War Emergency Legislation—Liquor Control—Acquisition of Property—"Compulsorily or by agreement"—Compensation—Mode of Assessment—Defence of the Realm (Amendment) (No. 3) Act, 1915 (5 & 6 *Geo.* 5, *c.* 42), *s.* 1, *sub-s.* 2 (*b*)—*Defence of the Realm (Liquor Control) Regulations*, 1915, *reg.* 6—*Incorporation of Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18).

The Defence of the Realm (Amendment) (No. 3) Act, 1915, which received the Royal assent on May 19, 1915, provided, by s. 1, sub-s. 2 (*b*), that "the prescribed Government authority" should have power to acquire, "compulsorily or by agreement," for a limited period or permanently, any licensed premises in an area to be subsequently defined. The defendants were constituted "the prescribed Government authority" by regulations issued pursuant to the Act on June 10, 1915, with power (reg. 6) to acquire, "compulsorily or by agreement," licensed premises in the area. By Order in Council issued on September 24, 1915, the area—in which licensed premises belonging to the plaintiffs were—was defined. On December 22, 1915, the defendants gave to the plaintiffs notice that they intended to acquire the premises permanently and in January, 1916, they took possession. The plaintiffs claimed compensation to be assessed under the Lands Clauses Consolidation Act, 1845. The defendants contended that they were entitled only to such compensation as might be awarded out of public moneys as a matter of grace by a Royal Commission appointed on August 2, 1915, to determine what ought "in reason and fairness" to be paid in respect of "losses incurred by reason of interference with property" through the exercise by "the prescribed Government authority" of its powers under the Act of 1915:—

Held, by Younger J., that, on the principles stated in *Reg.* v. *Abbott* [1897] 2 I. R. 362, 405, *Commissioner of Public Works (Cape Colony)* v. *Logan* [1903] A. C. 355, 363, 364, and *Attorney-General* v. *Horner* (1884) 14 Q. B. D. 245, 256, acquisition "compulsorily or by agreement" in s. 1, sub-s. 2 (*b*), of the Act of 1915 and reg. 6, involved payment, and that the Lands Clauses Act must be taken to be incorporated in the Act of 1915, that Act and the regulations constituting "the special Act" and the "undertaking" being the control or monopoly in the national interest of the sale and supply of excisable liquors within the prescribed area, of which "undertaking" the defendants were "promoters."

Held by the Court of Appeal (affirming the decision of Younger J.),

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that the plaintiffs had a legal claim to be paid compensation in respect of the premises compulsorily acquired by the defendants.

Held, also (affirming the decision of Younger J., Bankes L.J. dissenting), that the plaintiffs were entitled to have such compensation assessed under the Lands Clauses Act.

ACTION.

The plaintiffs, by their statement of claim, claimed that under the Defence of the Realm Acts and/or under the Lands Clauses Act, or in the alternative by virtue of the Defence Acts, 1842 to 1873, and/or the Military Lands Acts, 1892 to 1903, or otherwise, they were entitled as a matter of right to proper compensation in respect of certain licensed premises at Enfield Lock compulsorily acquired by the defendants, the Central Control Board (Liquor Traffic). The defendants, by their defence, objected that the plaintiffs' statement of claim disclosed no cause of action or any title to relief against them. Further, and in the alternative, the defendants pleaded that the only method and procedure by which the plaintiffs could obtain payment of any sum in respect of their property so taken from them was to prefer a claim before the Defence of the Realm (Liquor Control) Royal Commission, and that it was a condition precedent to any relief that the plaintiffs should obtain a report from the Commission. They further pleaded in the alternative that if the plaintiffs were entitled to compensation the amount must be settled by arbitration.

The serious and important question, therefore, raised by the case was whether the defendant Board, which was constituted by the Defence of the Realm (Liquor Control) Regulations made in pursuance of the Defence of the Realm (Amendment) (No. 3) Act, 1915 (5 & 6 Geo. 5, c. 42), were empowered to acquire the fee simple of the licensed premises of the plaintiff company without making payment of any compensation therefor beyond such a sum as might, as an act of grace, be awarded to the plaintiffs out of public moneys.

The Act of 1915 received the Royal assent on May 19, 1915. It provided by s. 1, sub-s. 1, that, "where it appears to His Majesty that it is expedient for the purpose of the successful prosecution of the present war that the sale and supply of intoxicating liquor in any area should be controlled by the State," on grounds there

specified, "His Majesty has power, by Order in Council, to define the area and to apply to the area the regulations issued in pursuance of this Act under the Defence of the Realm Consolidation Act, 1914, and the regulations so applied shall, subject to any provisions of the Order or any amending Order, take effect in that area during the continuance of the present war and such period not exceeding twelve months thereafter as may be declared by Order in Council to be necessary in view of conditions connected with the termination of the present war." Sub-s. 2: "His Majesty in Council has power to issue regulations under the Defence of the Realm Consolidation Act, 1914, to take effect in any area to which they are applied under this Act—(*a*) for giving the prescribed Government authority, to the exclusion of any other person, the power of selling or supplying, or controlling the sale or supply of, intoxicating liquor in the area, subject to any exceptions contained in the regulations; and (*b*) for giving the prescribed Government authority power to acquire, compulsorily or by agreement, and either for the period during which the regulations take effect, or permanently, any licensed or other premises or business in the area, or any interest therein, so far as it appears necessary or expedient to do so for the purpose of giving proper effect to the control of the liquor supply in the area; and (*c*) for enabling the prescribed Government authority, without any licence, to establish and maintain refreshment rooms for the supply of refreshments (including, if thought fit, the supply of intoxicating liquor) to the general public or to any particular class of persons or to persons employed in any particular industry in the area; and . . . . (*e*) generally, for giving effect to the transfer of the control of the liquor traffic in the area to the prescribed Government authority, and for modifying, so far as it appears necessary or expedient, the provisions of the Acts relating to licensing or the sale of intoxicating liquor in their application to the area."

On June 10, 1915, regulations under the Act were issued by His Majesty in Council. By reg. 1 the prescribed Government authority, the defendant Board, were constituted with power to sue and be sued. Any property acquired by the Board was to be vested in such two or more members thereof as the Board might appoint. By reg. 2: "For the purposes of the control of the sale and supply

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of intoxicating liquor in any area, the Board may by order—(*a*) direct that any licensed premises or club in the area in which intoxicating liquor is sold by retail or supplied shall be closed either for all purposes or for the purpose of such sale or supply; (*b*) regulate the hours during which any such premises or clubs are to be or may be kept open distinguishing, where it is so determined, the hours during which the premises are to be or may be kept open for such sale or supply as aforesaid, and the hours during which they are to be or may be kept open for other purposes, and any such order shall have effect notwithstanding anything in the law relating to licensing or the sale of intoxicating liquor; (*c*) prohibit the sale by retail or supply of any specified class or description of intoxicating liquor in any licensed premises or club in the area; (*d*) provide that the sale by retail or supply of intoxicating liquor in any licensed premises or club in the area shall be subject to such conditions or restrictions as may be imposed by the order; (*e*) regulate the introduction of intoxicating liquor into the area and the transport of intoxicating liquor within the area; (*f*) require the business carried on in any licensed premises in the area to be carried on subject to the supervision of the Board." Reg. 3: "The Board may by order prohibit the sale by retail, or the supply in clubs or licensed premises of intoxicating liquor within the area, or any part thereof specified in the order, by any person other than the Board"—thereby giving the Board power to secure within the area the monopoly of supply—"and if any person contravenes or fails to comply with the order he shall, without prejudice to any other penalty, be guilty of a summary offence against the Defence of the Realm (Consolidation) Regulations, 1914." Reg. 5: "The Board may either themselves or through any agents establish and maintain in the area, or provide for the establishment and maintenance in the area of, refreshment rooms for the sale or supply of refreshments (including, if thought fit, the sale or supply of intoxicating liquor) to the general public or to any particular class of persons, or to persons employed in any particular industry in the area." Reg. 6: "Where the Board consider that it is necessary or expedient for the purpose of giving proper effect to the control of the liquor supply in the area, they may acquire compulsorily or by agreement, either for the period during which these regulations take effect or

permanently, any licensed or other premises in the area, or any interest in any such premises: Provided that the Board may, in lieu of acquiring any interest in such premises, take possession of the premises and any plant used for the purposes of the business carried on therein for all or any part of the period during which these regulations take effect, and use them for the sale or supply of intoxicating liquor or for the purpose of any of the other powers and duties of the Board." Reg. 7: "Where the Board determine to acquire compulsorily any premises or any interest therein, they shall serve on the occupier of the premises and, if any person other than the occupier will be affected by the acquisition of the interest proposed to be acquired, also on any person who appears to the Board to be so affected, notice of their intention to acquire the premises, or such interest therein as may be specified in the notice, and where such notice is served, the fee simple in possession of the premises or such interest in the premises as aforesaid shall, at the expiration of ten days from the service of the notice on the occupier, by virtue of these regulations vest in the trustees for the Board, subject to or freed from any mortgages, rights, and interests affecting the same as the Board may by order direct." Reg. 8: "Where the Board consider that it is necessary or expedient for the purpose of giving proper effect to the control of the liquor traffic in the area they may, by the like procedure, acquire any business (including stock in trade) carried on in any premises within the area, whether or not they take possession of or acquire the premises in which such business is carried on, or any interest in the premises."

On September 24, 1915, by Order in Council an area, known as the London area, was duly defined and the regulations above set forth were applied to that area. The plaintiff company were the owners in fee simple of the fully licensed premises, known as "The Ordnance Arms," at Enfield Lock, within the London area. The house was in the occupation of George William Platt, who carried on the business of a licensed victualler under a yearly tenancy. On December 22, 1915, the defendant Board, in exercise of their powers given under the Act, regulations, and Orders in Council, served on the occupier and the plaintiff company a notice under reg. 7 that "they considered it necessary or expedient for the purpose of giving proper effect to the control of the liquor supply in the

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said area to acquire permanently and had determined to acquire permanently and compulsorily the fee simple in possession of the said premises, and that pursuant to the Defence of the Realm (Liquor Control) Regulations they intended to acquire compulsorily the said premises and the said interest therein free from any mortgages, rights or interests affecting the same, and the business of licensed victualler and refreshment caterer carried on upon the said premises." On or about January 4, 1916, the Board entered upon and took possession of the premises, the fee simple having at the expiration of ten days from the service of the notice, in terms of reg. 7, vested in the trustees of the Board freed from any mortgages, rights, and interests affecting the same. The Board on entering paid the tenant for his stock which they then took over, and negotiations followed between them and the plaintiff company as to the compensation which the plaintiffs were entitled to receive.

The view of the plaintiff company was that they were entitled to compensation for their property assessed under the Lands Clauses Act. The view of the defendant Board was that the plaintiffs were only entitled to such compensation as might be awarded them in accordance with the recommendation of the Royal Commission, which was appointed on August 2, 1915, under His Majesty's Royal Sign Manual "to inquire and determine and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public funds to applicants who (not being subjects of an enemy State) are resident or carrying on business in Our United Kingdom of Great Britain and Ireland in respect of direct and substantial losses incurred by them by reason of interference with their property or business in Our said United Kingdom through the exercise by the prescribed Government authority of its powers under the Defence of the Realm (Amendment) (No. 3) Act, 1915." Which view was right was the issue to be determined.

The action was heard before Younger J. on May 16 and July 25, 1917.

P. O. Lawrence, K.C., *Clayton, K.C.*, and *A. F. Wootten*, for the plaintiffs. The plaintiffs have a legal right to compensation. They do not question the validity of the regulations, which, indeed,

contemplate compensation throughout. The Royal Commission has nothing to do with legal rights. The principle governing the construction of these Acts is that Parliament does not strip a person of his property in an arbitrary manner, and an intention to take away property without compensation will not be imputed to the Legislature unless it be unequivocally expressed or necessarily implied or the safety of the State—which is not best secured by making jettison of individual interests—requires it: 1 Bl. Com., 138, 139; *Commissioner of Public Works (Cape Colony)* v. *Logan* (1); *Attorney-General* v. *Horner* (2); *Reg.* v. *Abbott.* (3)

The Defence of the Realm (Amendment) (No. 3) Act, 1915, is within the direct words of the Lands Clauses Consolidation Act, 1845, which Act can be incorporated with it without expressly stating it: *In re Wood's Estate* (4); *In re Mills' Estate* (5); *In re Ellison's Estate* (6); *Reg.* v. *London Corporation* (7); *Reg.* v. *St. Luke's Vestry.* (8) Both the Act of 1915 and the regulations made pursuant to it speak of the power to "acquire, compulsorily or by agreement." "Acquire" means to acquire by purchase. If "acquire compulsorily" meant taking without payment, it would be extraordinary to go on to speak of acquiring voluntarily by agreement, which connotes giving something in return: *Reg.* v. *Abbott.* (9)

The Lands Clauses Act was passed to avoid the necessity of the repetition in special Acts of usual provisions as to the acquisition of lands and compensation for them: see the preamble of s. 1. The defendants are "promoters" empowered by special Act to carry out an "undertaking," namely, the control and supply of liquor within an area. They can acquire land for the purpose of executing their undertaking. No definition of "undertaking" is to be found, but it means an undertaking "of whatever nature" which shall by the special Act be authorized (s. 2). The defendants come directly within the Act. Analogous cases before the present war are those of the Defence Act, 1860 (23 & 24 Vict. c. 112), the Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), the Ranges Act,

(1) [1903] A. C. 355, 364.
(2) 14 Q. B. D. 245, 256, 257.
(3) [1897] 2 I. R. 362, 405.
(4) (1886) 31 Ch. D. 607.
(5) (1886) 34 Ch. D. 24.
(6) (1856) 8 D. M. & G. 62.
(7) (1867) L. R. 2 Q. B. 292.
(8) (1871) L. R. 6 Q. B. 572; affirmed L. R. 7 Q. B. 148.
(9) [1897] 2 I. R. 362, 391, 408.

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1891 (54 & 55 Vict. c. 54), the Military Lands Act, 1892 (55 & 56 Vict. c. 43), and the Military Lands Act, 1903 (3 Edw. 7, c. 47)—all using the same terms, "acquire" and "acquisition," and all meaning the same thing, purchase compulsorily or by agreement. The provision in s. 1, sub-s. 2 (*b*), of the Act of 1915, that the acquisition may be "either for the period during which the regulations take effect"—i.e., the continuance of the war and a period not exceeding twelve months afterwards—"or permanently," is another indication that compensation is intended. So also is the provision in reg. 7 that the fee simple shall vest "subject to or freed from any mortgages," &c. The Act of 1915 and the regulations are together "the special Act." This is a case of a special Act, passed after the Lands Clauses Act, authorizing a public undertaking and the taking or purchase of land for the undertaking, and the Lands Clauses Act is therefore automatically incorporated with it (s. 1), and not the less so because the undertaking is not a commercial one.

This case is within the scope of the Act of 1915 and the regulations and quite apart from any question of the exercise of the Royal prerogative. It is not therefore necessary to refer to *In re a Petition of Right*. (1) If it were, it would be sufficient to say that this is not like a case of digging up a man's land for trenches or going on his land for purposes of defence, but is something which, if the defendants are right, is contrary to the Great Charter.

Sir Gordon Hewart, S.-G., and *H. M. Giveen*, for defendants. There is no intention of taking without compensation. There is no question that there ought to be compensation. The only question is what the compensation should be and what the tribunal and mode of assessment. The phrase "compulsorily or by agreement" is not a term of art—there is no magic in the words. They do not incorporate the Lands Clauses Act. They are merely exhaustive of all means of acquiring land. Reg. 7 is not the procedure of the Lands Clauses Act. It is the antithesis of that Act. It is not for the defendants to show that they are not "promoters," but for the plaintiffs to show that they are. What the defendants are undertaking is not an "undertaking." It may be that Parliament could have made something which is not ordinarily an "undertaking"

(1) [1915] 3 K. B. 649.

to be such within the Act, but, where neither the undertaking nor the Act is mentioned in the special Act, there is no "undertaking" unless the work cannot be carried out without the aid of the Lands Clauses Act. If the regulations and the Lands Clauses Act are looked at, it is clear not only that that Act is not incorporated, but that it was intended to exclude it. If the Lands Clauses Act does not apply, there is no compensation at the moment provided except under the Proclamations. It was certainly intended there should be compensation. If this were a casus omissus, which it is not, the Court could supply it: *Bentley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) If it were a case under the Ranges Act, 1891, which incorporated in a modified form the Lands Clauses Act, the defendants could claim arbitration (s. 11). They rely, however, on the fact that the Lands Clauses Act is not incorporated.

Clayton, K.C., in reply. The onus is on the defendants, who are wrong in saying it is on the plaintiffs and have not cited a single authority in support of the position they take up.

Cur. adv. vult.

1917. July 31. YOUNGER J., after stating the facts and setting out the material provisions of the Act and regulations. It will be noticed that nowhere in the Act or regulations is there any express provision made for payment of compensation for any of the acts either of acquisition or interference which are thereby authorized. The Royal Commission, although doubtless in the contemplation of the Executive when the Act became law, is neither mentioned nor foreshadowed in the statute. It was not, in fact, appointed till three months after the passing of the Act, and its powers may, of course, at any moment be revoked or altered. It may indeed be doubted whether authority to assess the price of property taken, as distinct from compensation for property interfered with, is within the express terms of the Commissioners' reference, but apart from that, except as showing that there has never been any intention or desire on the part of the Executive to deal otherwise than fairly with the plaintiffs, it is conceded that the existence of the Commission gives the plaintiffs and others in a similar position no rights or advantages

(1) [1891] 3 Ch. 222.

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which may not at any moment be withdrawn. The claim of right made in this action is therefore not only of great importance to the plaintiffs themselves, but of wide general interest.

It may be conceded that emergency legislation passed in such times as these for the defence of the realm, in the largest sense of those words, is not likely to have that scrupulous regard for individual interests to which we have become accustomed in time of peace. Accordingly, absence of any provision for compensation, capable even of being implied, for the serious but temporary interference with private property authorized by reg. 2 need not excite surprise. But it was strongly urged by the plaintiff company that such considerations have no application to the power conferred upon the Board under reg. 6 to take compulsorily or by agreement, not only for the period during which the regulations have effect, but permanently, premises of any kind whatever. Can it be supposed, it was asked, that the Legislature, for the purpose of a statute whose objects will be exhausted within twelve months after the conclusion of peace, has authorized the defendant Board to take compulsorily without payment the fee simple in premises, not necessarily even licensed premises, with the result that the Board, after the Act is spent, will be in a position to realize the full value of property for which nothing has been paid to its former owners ? There could, it was urged, be no justification for denying the right to compensation in such a case, and a passage from the Irish case of *Reg.* v. *Abbott* (1) was read. The learned judge in that case said : "No doubt the Defence Act is of national importance, and salus populi, suprema lex. But the safety of the State is best secured by a general average contribution, and not by making jettison of individual interests." I agree with these words, which, as applied to the case in hand, are a very moderate statement of the position. But indeed the general principles of construction governing such matters were not questioned by the Solicitor-General ; nor was their application to the question in hand disputed.

I will refer as illustrating these principles to two cases only. The first is *Commissioner of Public Works* (*Cape Colony*) v. *Logan.* (2) The head-note is : "It is a sound canon of construction that an intention to take away property without compensation should not

(1) [1897] 2 I. R. 362, 405. (2) [1903] A. C. 355.

be imputed to a Legislature unless it be expressed in unequivocal terms. . . . . Where it appeared that road commissioners claimed to expropriate without compensation the respondent's land for railway purposes on the ground that s. 11 of Act IX. of 1858 effected a transfer to them of the rights derived by the Government from the Proclamation of 1813, and extended those rights so as to be applicable to the present case :—*Held*, that s. 11 must receive a strict construction. Its language was satisfied by the transfer of the existing powers without any extension thereof. It would require a more direct expression of intention to create such a new power of expropriation for railway purposes without compensation as was claimed." And Lord Davey sets forth the principle clearly in these words (1) : " But their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognised by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* " (2). The second is the case of *Attorney-General* v. *Horner* (3), where Brett M.R. said : " Now it is to be observed that if those Acts have taken away and interfered with such rights they have done so without giving any compensation, and it seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so."

Now, applying these principles to this case, what is the effect in s. 1, sub-s. 2 (*b*), of the Act of the words " to acquire, compulsorily or by agreement " ? Do these words involve payment ? I think they do. To acquire by agreement clearly does. It connotes such a

(1) [1903] A. C. 363, 364. (2) (1882) 7 App. Cas. 178, 188.
(3) 14 Q. B. D. 245, 256.

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payment as the vendor is willing to accept. If payment on compulsory taking is not also involved in that phrase, what a mockery the privilege of selling by agreement becomes! What sort of price will be offered under agreement if the property in default of agreement can be taken for nothing? I leave for separate treatment the inference which may fairly be drawn from the fact that these words are Lands Clauses Act words, and proceed to consider the regulations. Similar considerations apply to reg 6. The phraseology of the Act is, in fact, therein repeated, but further indications in the same direction are supplied by reg. 7. On compulsory purchase the property is to vest in trustees for the Board "subject to or freed from any mortgages, rights, and interests affecting the same." That seems clearly to show that the mortgage must either be discharged by the Board or assumed by the Board. They would never be required to assume it if they were entitled to get rid of it for nothing. Is it then to be contended, on the fair construction of that regulation, that the Board may take a man's property for nothing and yet leave him to discharge the incumbrances upon it? In my opinion, it cannot be necessary to have recourse to any special canon of construction to escape from such a result. I feel no doubt that the power to take "compulsorily or by agreement," whether subject to mortgage or free from mortgage, necessarily involves payment for what is taken.

The only question that remains is what payment is to be made. The plaintiffs' answer is payment under the Lands Clauses Act, which they say must be taken to be incorporated in the Act and regulations as constituting the special Act. They rely for that purpose on what was said by Lord Esher in *In re Wood's Estate* (1): "Now the effect of sect. 1 of the Lands Clauses Act obviously is (putting aside for the moment the question whether the Commissioners represent the Crown) that that Act is to be considered as incorporated with every subsequent Act which authorizes with respect to any undertaking the purchase or taking of lands, and every part of the Lands Clauses Act is incorporated, save so far as its provisions are expressly varied or excepted by the subsequent Act." Further, no express incorporation is necessary, and the Board here are not in the position of the Crown so as not to be bound by the statute. For that pro-

(1) 31 Ch. D. 607, 615.

position I refer to the judgment of Lindley L.J. in the same case, where he says (1): "No authority has been cited to shew that this particular corporation,"—that is, the corporation analogous to the defendant Board in this case—"incorporated by the Act of 1855 for certain public purposes, is to be treated as the Crown, and there is no ground for holding that a corporation specially incorporated in this way is in the same position as regards costs as the Crown. The corporation will be provided by Parliament with funds for whatever purpose is within the scope of their powers and obligations, including those which arise under the Lands Clauses Act. They will have to pay the costs of reinvestment in land out of these funds, and out of these funds they will have to pay the costs of the present application." I cannot think that the fact that the defendants are not in law a corporation can make any difference in principle to those observations.

It has still, however, to be determined whether there is here an "authorised undertaking" to which the Lands Clauses Act can be applied. The word "undertaking" in that Act means "the works or undertaking, of whatever nature, which shall by the special Act be authorised to be executed." Have we such an undertaking here? I think we have. It seems to me that the Board's undertaking may not improperly be described as "the control or monopoly in the national interest of the sale and supply of excisable liquors within prescribed naval and military or munition areas." The Solicitor-General, indeed, very strongly dissented from the view that the Board's duties, even as so described, could be fairly called an undertaking; but I find that the widest meaning is apparently as a matter of practice attributed to this word "undertaking" as used in the Lands Clauses Act, and, however unlike an undertaking the actual purpose in hand may be, it is not considered so necessary, in cases where the Lands Clauses Act is expressly incorporated in the special Act, to say that it shall be deemed to be the undertaking, as it is to say that unlikely people shall be deemed to be promoters. Take, for instance, the Military Lands Act, 1892 (55 & 56 Vict. c. 43), an Act to consolidate and amend certain enactments relating to the acquisition of land for military purposes. Sect. 2, sub-s. 2, is: "In the construction of this Act and the incorporated Acts this Act

(1) 31 Ch. D. 621.

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shall be deemed to be the special Act, and the Secretary of State, volunteer corps, or council of a county or borough, as the case may be (in this section referred to as 'the purchaser') shall be deemed to be the promoters of the undertaking." Or, again, the Ranges Act, 1891 (54 & 55 Vict. c. 54), an Act to facilitate the acquisition of ranges by volunteer corps, and others. In s. 3, sub-s. 1 (*b*), we find this: "In the construction of this Act and the incorporated Acts this Act shall be deemed to be the special Act, and the volunteer corps shall be deemed to be the promoters of the undertaking." In neither case is there any definition of the "undertaking," although its nature is by no means obvious. The difficulty, therefore, of finding an undertaking here does not appear to me to be formidable. But, further, the words "compulsorily or by agreement" are almost terms of art as applied to the Lands Clauses Act. Take, for instance, the Defence of the Realm (Acquisition of Land) Act, 1916 (6 & 7 Geo. 5, c. 63), where the Lands Clauses Act is expressly incorporated with modification. Sect. 3, sub-s. 1, is as follows: "Subject to the provisions of this Act it shall be lawful to acquire by agreement or compulsorily on behalf of His Majesty"—the very words used in this statute, the order only being inverted. The Solicitor-General, indeed, argued that these words were a mere statement of alternatives which were exhaustive. I cannot agree with him. The description is not to my mind exhaustive, and I cannot think that the use of such a well-known phrase in such a connection was accidental. I quite agree that it is a difficulty in the plaintiffs' way that the Lands Clauses Act is not specially mentioned, that its application to the case is not immediately obvious, that its presumed incorporation in the statute without modification except as provided by reg. 7 is inconvenient and burdensome. But these difficulties are not, in my opinion, either separately or together, fatal to the plaintiffs' contention on this point; and, as the alternative to that contention is that there is no provision made in the statute at all for ascertaining the compensation which it is to my mind inconceivable Parliament did not intend persons in the position of the plaintiff company to have, I reach the conclusion that in this matter the plaintiffs are right.

The Solicitor-General suggested, but only faintly, that this taking

could be justified by reference to the prerogative, in the exercise of which no compensation would be payable as of right; and he said that the provisions of s. 1 of the Act, dealing with the powers of His Majesty, were declaratory—that the section did not purport to confer powers. Even so, however, the powers thereby declared are stated to be derived from the Defence of the Realm Consolidation Act, 1914; and it is not suggested that they proceed from the Royal prerogative. Moreover, the King is not entitled under his prerogative to take a man's fee simple estate. The extent of His Majesty's right was, in *In re a Petition of Right* (1), stated by Warrington L.J. as "the right to take and use the lands for so long and in such manner as may be necessary for securing the public safety and the defence of the realm during the present war." It cannot, I think, go further if Magna Charta is to remain unrepealed; and in the same case the Attorney-General agreed that when a man's land was taken permanently he was no doubt entitled to compensation.

In the result, I think the plaintiffs are right in the principle for which they contend, and, accordingly, I am prepared to declare that the plaintiff company is lawfully entitled by virtue of the Defence of the Realm (Amendment) (No. 3) Act, 1915, and the regulations issued in pursuance thereof under the Defence of the Realm Consolidation Act, 1914, and by virtue of the Lands Clauses Acts, to proper compensation, and I order the defendants to pay the costs of this action.

A. L.

C. A.

The defendants appealed. The appeal was heard on March 22, 25, 1918.

Sir Gordon Hewart, S.-G., and *H. M. Giveen*, for the appellants.

P. O. Lawrence, K.C., Clayton, K.C., and *A. F. Wootten*, for the respondents.

The arguments were substantially the same as those used in the Court below. The following additional cases and Acts were cited: *London and North Western Ry. Co.* v. *Evans* (2); *In re Cherry's Settled Estates* (3); *Doe* v. *North Staffordshire Ry. Co.* (4); *Wale*

(1) [1915] 3 K. B. 649, 665.
(2) [1893] 1 Ch. 16.
(3) (1862) 4 D. F. & J. 332.
(4) (1851) 16 Q. B. 526.

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v. *Westminster Palace Hotel Co.* (1); *The Broadmayne* (2); *The Zamora* (3); *In re Manor of Lowestoft and Great Eastern Ry. Co.* (4); *Cookson* v. *Lee* (5); *Shepherd* v. *Hills* (6); Lands Clauses Consolidation Act, 1845, ss. 5-15, 18, 19, 20, 21, 68, 85; Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), s. 1.

Cur. adv. vult.

May 16. SWINFEN EADY M.R. read the following judgment:—The plaintiffs were the owners in fee simple of the fully licensed premises known as "The Ordnance Arms," at Enfield Lock in the parish of Enfield in the county of Middlesex, on which was carried on the business of a licensed victualler. The premises were in the occupation of one George William Platt, who was a yearly tenant under an agreement in writing dated September 28, 1910.

On December 22, 1915, the defendants, purporting to act under the powers conferred by the Defence of the Realm Consolidation Act, 1914, the Defence of the Realm (Amendment) (No. 3) Act, 1915, and the Defence of the Realm (Liquor Control) Regulations, 1915, served the plaintiffs with notice that they had determined to acquire compulsorily the fee simple in possession of the said premises. Such notice contained the following:—"Note:—By virtue of the said regulations the fee simple in possession of the said premises or such interest therein as above mentioned will at the expiration of ten days from the service of this notice on the occupier vest in the trustees for the Board."

The plaintiffs have not raised any question as to the validity of the regulations, or any of them, and I therefore refrain from expressing any opinion upon them, but it must not be assumed that where a statute confers power upon His Majesty in Council to issue regulations under the Defence of the Realm Consolidation Act, 1914, for giving the prescribed Government authority power to acquire premises "compulsorily or by agreement," that such power authorizes the making of regulations under which, merely by service of a notice of intention to acquire, the fee simple in such premises will vest in the prescribed authority, without any payment

(1) (1860) 8 C. B. (N.S.) 276.
(2) [1916] P. 64.
(3) [1916] 2 A. C. 77.
(4) (1883) 24 Ch. D. 253.
(5) (1853) 23 L. J. (Ch.) 473.
(6) (1855) 11 Ex. 55.

or conveyance, and free from any previously subsisting mortgage therein. Assuming, however, for the purposes of this case the validity of the notice of intention to acquire, the question between the parties is what is the effect of such notice, and what rights (if any) arise in favour of the plaintiffs upon being served with such notice, and (after the expiration of ten days) upon the fee simple in the premises shifting from themselves to the trustees for the defendant Board, in accordance with the procedure of the regulations. [His Lordship referred to the nature of the claim put forward by the plaintiffs in their statement of claim and to the defence raised by the defendants in their defence, and continued :] The plaintiffs by their reply alleged that on March 16, 1916, they presented an application for compensation to the said Royal Commission, such application stating that the plaintiffs reserved all their rights ; but by a letter of April 3, 1916, the secretary of the Royal Commission, by the direction of such (Liquor Control) Commission, informed the plaintiffs that in view of the terms of reference of the Commission, which extended only to cases " not otherwise provided for," the Commission would be ready to consider the application only if the plaintiff company was prepared to waive any legal rights it might possess in respect of the matters dealt with in the application. The plaintiff company was not, however, prepared to make the said waiver, and accordingly the application to the Royal Commission was not further proceeded with. Although the defendants, who have acquired compulsorily the plaintiffs' freehold licensed premises, by their defence denied that the plaintiffs had any legal claim against them in respect thereof, yet the Solicitor-General, who appeared for the defendants, conceded that the plaintiffs' property could not be taken from them without compensation ; but he nevertheless insisted that the only method of obtaining such compensation was by preferring a claim before the said Royal Commission. This does amount to a contention that the plaintiffs have not any legal right to compensation, and the proposition is a startling one.

The terms of the Commission, which was dated August 2, 1915, were " to inquire and determine and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public funds to applicants who (not being subjects of an

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enemy State) are resident or carrying on business in the United Kingdom of Great Britain and Ireland in respect of direct and substantial loss incurred by them by reason of interference with their property or business in Our said United Kingdom through the exercise by the prescribed Government authority of its powers under the Defence of the Realm (Amendment) (No. 3) Act, 1915"; and the Commissioners were from time to time to report to the Treasury their opinions. The terms of the Defence of the Realm Losses Commission dated March 31, 1915, are almost identical with the terms of the Defence of the Realm (Liquor Traffic) Commission. Lord Torrington is chairman of both Commissions. The views adopted by the Defence of the Realm Losses Commission as to their position and duties, and which have been continuously adopted and acted upon by them, appear in their First Report, and especially in pars. 3 to 8 thereof. Par. 3 is as follows: "Having regard to the terms of our appointment, we have declined to consider any application which was 'otherwise provided for' in the sense that the applicant had, or claimed to have, any rights enforceable in a Court of law, under any statutory enactment or under any agreement to which the Crown was a party." In their Second Report, dated September 20, 1917, the Commissioners say in par. 4: "We have not found it necessary to modify any of the principles laid down in paragraphs 3 to 8 of our First Report, which have continued to guide our deliberations and determinations." The letter of April 3, 1916, which was admitted to have been duly written on behalf of the Liquor Control Royal Commission by their secretary to the plaintiffs' solicitors, shows that the ordinary procedure of the Liquor Control Commission was the same as the Defence of the Realm Losses Commission. This letter states that the writer is directed by the Defence of the Realm (Licensed Trade Claims) Commission, Southern Division, to call attention to the fact that the plaintiffs in their application "reserve all their rights," and then proceeds as follows: "In view of the terms of reference of the Commission, which extend only to cases 'not otherwise provided for,' the Commission would be ready to consider the application only if the applicants are prepared to waive any legal rights they may possess in respect of the matters dealt with in the application; and I am accordingly to request that the form may be amended in this

respect, re-verified by a fresh statutory declaration, and returned to the Commission." Thus the Commission does not purport to deal with legal claims, but only with the claims of persons who admit that they have not any legal rights, or who waive them if they exist, and who endeavour to make out a case for the favourable consideration of the bounty of the Crown. The Commissioners do not proceed upon any legal basis, or deal with claims upon any legal footing. Their whole procedure is, as they truly set forth in the Reports of the Defence of the Realm Losses Commission, limited to cases of bounty where all legal rights are waived, and instances of some of their decisions given in the appendix to their Reports show that they have not proceeded on any legal lines. The Commission is not and does not purport to be a Court for deciding any legal claims, and the argument of the Solicitor-General that the only procedure open to the plaintiffs is to prefer a claim before the Liquor Traffic Commission amounts to a denial that the plaintiffs have any legal claim.

Is this in truth the plaintiffs' position ? Has Parliament really sanctioned the confiscation of whatever property the Liquor Control Board choose to take under the Defence of the Realm (Liquor Control) Regulations, 1915 ? I am aware that the Solicitor-General repudiated the idea of confiscation, and said that it had always been intended to pay the value of the property compulsorily taken, but such repudiation amounts to very little when it is accompanied by the contention, persisted in to the end, that the plaintiffs' only right is to make a claim before the Liquor Traffic Commission.

By the Defence of the Realm (Amendment) (No. 3) Act, 1915, His Majesty in Council is given power to issue regulations for giving the prescribed Government authority power to acquire compulsorily or by agreement, and either for the period during which the regulations take effect or permanently, any licensed or other premises or business in the prescribed area, or any interest therein, so far as it appears necessary or expedient to do so for the purpose of giving proper effect to the control of the liquor supply in such area. This language indicates that the Government authority must pay for what it takes. It may acquire "compulsorily or by agreement"; but every basis for negotiating or arriving at an agreement would be taken away if, in default of agreement, the

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Government could acquire compulsorily and without any legal liability to pay for what it so acquired. Again, under reg. 7 of the Liquor Control Regulations the premises which the Board determine to acquire compulsorily are to vest in the trustees for the Board, subject to or freed from any mortgages, rights, and interests affecting the same as the Board may by order direct. Without expressing any opinion in favour of the legality of this regulation, it is inconceivable that under a power to acquire premises compulsorily contained in a statute the body so empowered to purchase can by a simple notice vest the premises in themselves or in trustees for themselves, free from any mortgage, and leave the former owner without any legal remedy for purchase-money and liable to pay the mortgage debt. Although the statute of 1915 was doubtless an urgent war measure, the period for which property may be taken is not limited to the time during which the statutory regulations have effect; the authority may acquire any licensed or other premises in the prescribed area permanently; and the areas doubtless embrace much property of great value. No intention can be attributed to Parliament of taking away from individuals their property without paying them for it, unless such intention be expressed in clear and unequivocal language. It may often be in the interests of the State that the particular property of individuals should be taken, either temporarily or permanently, for the State; but it is difficult to appreciate why in such cases the cost or expense should not justly fall on the State, for whose benefit it is taken, and not on the individual owner.

In *Attorney-General* v. *Horner* (1) Brett M.R. said: "It seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it." And in *Commissioner of Public Works* (*Cape Colony*) v. *Logan* (2) Lord Davey said: "Their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognised by the Courts of this country as a canon

(1) 14 Q. B. D. 245, 257. (2) [1903] A. C. 355, 363.

of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.*" (1) For these reasons I am of opinion that the contention of the appellants that the plaintiffs have not any legal claim cannot be supported. The defendants are in my judgment legally liable to pay compensation for the premises they were empowered to acquire compulsorily, and which they claim to have validly so acquired.

If, then, the plaintiffs have a legal right to be paid by the defendants for the value of the premises, how is the amount to be ascertained? If no other method has been provided, the amount must be determined in an action between these parties: see *Bentley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2)

The plaintiffs, however, insist that statutes do provide a method and that the compensation must be assessed under the Lands Clauses Acts. The preamble of the Act of 1845 (repealed by the Statute Law Revision Act, 1891) recited that it was expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same. Sect. 1 provides as follows: "This Act shall apply to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed, together therewith, as forming one Act." Then the section continues: "And with respect to the construction of this Act and of Acts to be incorporated therewith, be it enacted as follows:"; and then there is s. 2: "The expression 'the special Act,' used in this Act, shall be construed to mean any Act which shall be hereafter passed which shall authorize the taking of lands for the undertaking to which the same relates, and with which this Act shall be

(1) 7 App. Cas. 178, 188. (2) [1891] 3 Ch. 222.

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so incorporated as aforesaid; and the word 'prescribed' used in this Act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word shall occur shall be construed as if, instead of the word 'prescribed,' the expression 'prescribed for that purpose in the special Act' had been used; and the expression 'the works' or 'the undertaking' shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorized to be executed; and the expression 'the promoters of the undertaking' shall mean the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special Act empowered to execute such works or undertaking." After s. 5 there follows a group of clauses dealing with the purchase of lands by agreement, and after s. 15 another group of clauses dealing with the purchase of lands otherwise than by agreement.

It was urged by the appellants that the authorized operations of the Board did not constitute an "undertaking" within the meaning of the Lands Clauses Act, but it is difficult to see why not. The Act authorizes regulations for giving the prescribed Government authority power to acquire premises, and, without any licence, to establish and maintain refreshment-rooms for the supply of refreshments (including, if thought fit, the supply of intoxicating liquor) to the general public, or to any particular class of persons. The prescribed Government authority is thus empowered to carry on a great undertaking of a public nature; it is manifestly intended that shall be done with public money. By the statute 18 & 19 Vict. c. 95 (the Downing Street Public Offices Extension Act, 1855), the Commissioners of Works and Public Buildings were empowered to acquire compulsorily or by agreement certain hereditaments and erect thereon certain offices and buildings for the public service. The Commissioners were incorporated for the purposes of the Act. It was held by the Court of Appeal that the Lands Clauses Acts were applicable, although not expressly mentioned in the Act of 1855. There was thus an "undertaking," and the Commissioners of Works and Public Buildings thereby incorporated were the "promoters of the undertaking": *In re Wood's Estate.* (1) Lord Esher M.R. said,

(1) (1886) 31 Ch. D. 607, 614.

after stating the facts: "The Commissioners took the land, and were obliged to pay for it, under and by virtue of the Act 18 & 19 Vict. c. 95, which was passed in 1855, and, therefore, after the passing of the Lands Clauses Act. The first question, therefore, is whether any part of the Lands Clauses Act, though it is not expressly mentioned in the Act of 1855, is to be considered as incorporated into that Act, and, if so, whether the whole of it is incorporated? Now the effect of sect. 1 of the Lands Clauses Act obviously is (putting aside for the moment the question whether the Commissioners represent the Crown) that that Act is to be considered as incorporated with every subsequent Act which authorizes with respect to any undertaking the purchase or taking of lands, and every part of the Lands Clauses Act is incorporated, save so far as its provisions are expressly varied or excepted by the subsequent Act. It follows that the Lands Clauses Act (unless there be something expressly varying or excepting any particular provision of it) is incorporated into this Act of 1855, subject to the question with regard to the Crown." The defendants, as the Board empowered by statute to execute the undertaking, are, within the meaning of s. 2, the "promoters of the undertaking." The Act is not limited to undertakings formed for the purpose of making or earning profit, although these are included. The undertaking, to be within the Act, must be an undertaking of a public nature, as this undertaking certainly is. The Solicitor-General urged that the machinery for acquiring the lands and premises under the regulations did not fit in with the provisions of the Lands Clauses Acts. The answer to this argument is that you cannot construe the statute passed in May, 1915, by the subsequent regulations of June, 1915. These regulations were apparently designed to exclude Lands Clauses Act procedure, but if upon the passing of the statute of 1915 the Lands Clauses Acts are to be deemed to be incorporated, the subsequent regulations cannot exclude the operation of these Acts. It was further urged by the appellants that the Lands Clauses Acts do not bind the Crown, which is not mentioned therein; but the defendants are not the Crown: see *In re Wood's Estate.* (1) The defendants are constituted by reg. 1, and consist of a chairman and such persons as the Minister of Munitions may from time to time

(1) 31 Ch. D. 607.

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appoint. The Board may sue and be sued, and has an official seal which is to be officially and judicially noticed. The fac that the Board is not incorporated does not make any difference in considering whether the Board is to be considered as the Crown.

I am of opinion that the Defence of the Realm (Amendment) (No. 3) Act, 1915, authorizes an undertaking, and also authorizes the purchase or taking of lands for such undertaking, and it is quite immaterial that the detailed regulations are defined by an Order in Council, which the statute itself authorizes. The undertaking is authorized by the statute, and nothing but a statute could so authorize any such undertaking. The compulsory purchase of land, and superseding the ordinary licensing law, could only be effected by statute. In my opinion the Lands Clauses Acts apply to an undertaking authorized by the Defence of the Realm (Amendment) (No. 3) Act, 1915.

I am of opinion that the judgment of Younger J. was correct and that the appeal fails, and should be dismissed.

BANKES L.J. read the following judgment:—This appeal raises questions of general importance. Not only has the position of persons whose property has been taken by the Central Control Board to be defined, but attention is necessarily directed to the disadvantage attending a system of legislation under which the main outlines only of some proposal before Parliament are settled by the Legislature, and it is left to the Executive to set up the machinery by which the proposal as outlined is to be carried into effect. The times, no doubt, are abnormal. Emergency legislation in time of war cannot be expected to proceed on exactly the same lines as legislation in times of peace. I venture to doubt, however, whether the extent to which private rights and the rights of property are endangered by the system of legislation to which I have referred is sufficiently appreciated.

The dispute between the respondents and the Central Control Board arises under the following circumstances.

The respondents were the owners of certain licensed premises known as "The Ordnance Arms," Enfield Lock, within the London area to which the Defence of the Realm (Liquor Control) Regula-

tions, 1915, had been applied by an Order in Council dated September 24, 1915.

The Central Control Board caused a notice under reg. 7 of the above regulations, dated December 22, 1916, to be served upon the respondents informing them that the Board intended to acquire compulsorily the fee simple in possession of the above premises freed from any mortgages, rights, or interests affecting the same, including forecourt, draw-up yards, gardens and land adjoining, in the occupation of George William Platt, used for the business of a licensed victualler, and the business of licensed victualler and refreshment caterer carried on in the said premises.

A notice so served has under reg. 7 a very summary effect, as the regulation provides that the fee simple in possession of the premises referred to in the notice shall at the expiration of ten days from the service of the notice on the occupier by virtue of the regulations vest in the trustees for the Board, subject to or freed from any mortgages, rights, and interests affecting the same as the Board may by order direct.

The notice was served on the occupier on December 22, and the Board took possession of the premises on January 4.

By a letter dated December 24 addressed by the solicitors for the Board to the respondents they were informed that they would be entitled to apply to the Royal Commission to fix the amount of compensation to be paid in respect of their interest in the premises.

The respondents accordingly prepared a claim for submission to the Royal Commission which was completed and submitted in the month of March. In reply the secretary of the Royal Commission returned the claim, stating that the Commission would be ready to consider the application only if the applicants were prepared to waive any legal rights they might possess in respect of the matters dealt with in the application. This the respondents very naturally refused to do; and after taking advice they gave a formal notice under s. 68 of the Lands Clauses Consolidation Act, 1845, claiming compensation and requiring the Board to summon a jury to assess the same. The Board refused to acknowledge the validity of the notice, or that the Lands Clauses Act had any application to the case, and they did not summon a jury. At one time the respondents contended that owing to the Board's default in summoning a jury

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they were entitled to the full amount of the compensation claimed, but this claim was not persisted in, and the question which was ultimately fought out between the parties before Younger J. was whether, as the respondents contended, the Lands Clauses Act, 1845, applied to their case, or whether, as the Board contended, that Act had no application, and that the respondents' only means of obtaining any compensation was by application to the Royal Commission. It is obvious from a glance at the figures in the respondents' claim as submitted to the Royal Commission that the amount of compensation which the respondents would be likely to obtain would be materially different according to whether their contention or that of the Board was accepted.

The trade done at the licensed premises as represented by payments for beer, wines and spirits, and other goods was as follows: 1913, 1215*l.*; 1914, 2018*l.*; 1915, 4653*l.*, showing a very large increase of trade, resulting, presumably, from the war conditions existing in the immediate neighbourhood. If the respondents were right in their contention they might reasonably expect to receive compensation on the basis of the increased value of the premises to them; but on the other hand it would be, to say the least of it, doubtful whether the Commissioners would award any compensation for the increase in value created by the war conditions. Younger J. decided in favour of the respondents' contention. I am not able to agree with his view. Nor can I accept the contention put forward on behalf of the Board. In my opinion neither side was right in the contentions they put forward before the learned judge in the Court below and in this Court. Though I differ from the learned judge upon the grounds of his judgment, I do not differ from him in thinking that the respondents are entitled to be paid the value of the property which has been taken from them.

Both parties base their arguments, as they are bound to do, upon the provisions of the statute 5 & 6 Geo. 5, c. 42—the Defence of the Realm (Amendment) (No. 3) Act, 1915. The respondents insist upon the canon of construction laid down in many cases that an intention of taking away property without compensation must not be imputed to the Legislature, unless it be expressed in unequivocal language. In *Attorney-General* v. *Horner* (1) the Master

(1) 14 Q. B. D. 245, 257.

of the Rolls states the rule in the following language: "It seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so."

The Solicitor-General does not contest the existence or the application of the rule. Indeed he professes to rely upon it in support of his argument.

The question, therefore, between the parties is reduced to this: How is the amount which the respondents are entitled to be paid for their property to be ascertained? The argument for the respondents was put in this way. It was said that the statute itself makes no mention of compensation. Unless, therefore, the Lands Clauses Act, 1845, applies there is no provision for payment of any compensation, and the Act therefore authorizes confiscation, which the Legislature cannot have contemplated.

For the Board it was urged that the Act contemplated the payment of compensation, but that the Legislature made no provision for it at the time, leaving the making of the necessary provision either to the Executive or to the Crown, and, further, that the provision made, and the only provision made, was by the appointment of the Royal Commission on August 16, 1915.

In my opinion the contention put forward on behalf of the Board cannot be supported. The language of the Act itself disposes of it. The Act takes the form of a recital of the powers vested in His Majesty, namely, that under the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), where it appears to him expedient for the purpose of the successful prosecution of the present war that the sale and supply of intoxicating liquor in any area should be controlled by the State, he may by Order in Council define the area and apply to the area the regulations issued in pursuance of this Act. The Act then goes on to provide that the regulations so applied shall, subject to any provisions of the Order or any amending Order, take effect during the continuance of the present war. It then

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proceeds to set out the various matters in regard to which His Majesty in Council has power to issue regulations under the Defence of the Realm Consolidation Act, 1914. These matters include s. 1, sub-s. 2 (*b*)—the power for giving the prescribed Government authority power to acquire, compulsorily or by agreement, and either for the period during which the regulations take effect, or permanently, any licensed or other premises or business in the area, or any interest therein, so far as it appears necessary or expedient to do so for the purpose of giving proper effect to the control of the liquor supply in the area.

It is not necessary to refer in detail to the other matters set out in the sub-section. It is, however, material to notice that the exercise of the powers in relation to these matters may, where no property is acquired, result in the interference with property or business. The first material question in this case is to determine the meaning which is to be given to the words "acquire compulsorily or by agreement." Is the distinction contemplated by the Legislature a distinction between confiscation and purchase, or is it a distinction between acquisition by the will of the parties interested and where the price to be paid is arrived at by agreement, and acquisition against the will of such parties and where the price to be paid is to be arrived at otherwise than by agreement? It hardly needs the assistance of the accepted rule of construction to which I have referred to compel the conclusion that the latter is the right construction. If so, acquisition in either case involves payment of the value of the property taken, and payment as a statutory and legal right capable of enforcement as such. If this conclusion is the correct one, it disposes of the contention put forward on behalf of the Board, and for this reason. The Royal Commission appointed in August, 1915, was appointed to deal only with cases not otherwise provided for, and then not to award compensation, but only to report to the Lords Commissioners of the Treasury what sums ought in reason and fairness to be paid out of public funds to applicants in respect of direct and substantial loss incurred by them by reason of interference with their property or business. It was certainly a strange omission, if the contention on the part of the Board is correct, that no reference is made to the far more serious loss likely to result from the acquisition of the entire

property or business. The respondents claimed a recognition of their legal and statutory right. They were offered the opportunity of applying for an ex gratia payment. They claimed a decision which they could enforce in a Court of law; they were offered a report to His Majesty's Treasury. Well might the respondents say that they asked for bread and were given a stone.

Having arrived at the conclusion that the respondents have by the very language of the statute been given a legal and statutory right to be paid the value of their property which has been compulsorily acquired by the Board, it follows that, unless some statutory or other provision to the contrary exists, they are entitled to recover that value by properly constituted proceedings in a Court of law. It is not necessary to discuss in detail the Defence of the Realm (Liquor Control) Regulations, 1915, which were made in pursuance of the Act, or to consider how far they can all of them be said to be intra vires of the statute. It is sufficient for the present purpose to note that the Central Control Board (Liquor Traffic) was set up as the prescribed Government authority, and provision was made that the Board might sue and be sued. There is no ground, in my opinion, for saying that the Board must be treated as acting on behalf of the Crown, which can only be approached by a petition of right.

Unless, therefore, the respondents are right in their contention that the Lands Clauses Consolidation Act applies to their case, there would appear to be no obstacle to the respondents enforcing their right to payment for the property by action.

The Lands Clauses Act provides by s. 1 that the Act shall apply to every undertaking authorized by any Act thereafter to be passed which shall authorize the purchase or taking of lands for such undertaking, and it also provides that the Act shall be incorporated in such Act, and that all the clauses and provisions of the Act shall, save so far as they shall be expressly varied or excepted by any such Act, apply to the undertaking authorized thereby so far as the same shall be applicable to such undertaking. "Undertaking" is defined by the Act to mean the undertaking, of whatever nature, which shall by the special Act be authorized to be executed. Speaking generally, it appears to me to be a straining of language to speak of the control to be exercised by the State by means of a

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prescribed Government authority over the sale and supply of intoxicating liquor within certain areas as an undertaking within the meaning of the Lands Clauses Act to be executed by that authority, even though the powers conferred on the authority include the acquisition of lands. A closer examination of the statute confirms the view that it does not apply to the present case. In the first place the Act only applies to an undertaking authorized by an Act of Parliament. Is the undertaking of the Central Control Board an undertaking authorized by the Defence of the Realm (Amendment) (No. 3) Act, 1915 ? In a sense no doubt it is, or purports to be so authorized. To come within the meaning of the expression " authorized " as used in the Lands Clauses Act I think that the undertaking must be sufficiently defined by the special Act to enable it to be ascertained from the language of the Act itself what the nature and extent of the undertaking is, so that by a comparison of the language of the special Act with the language of the Lands Clauses Act it may be determined, as s. 1 of the Lands Clauses Act requires it to be determined, how far the clauses and provisions of the Lands Clauses Act are expressly varied or excep ed by the special Act and how far they are applicable to the undertaking authorized by the special Act. In the case of the Defence of the Realm (Amendment) (No. 3) Act, 1915, nothing is determined in the Act itself as to the form the undertaking of the prescribed Government authority shall ultimately take. It is true that the Act recognizes an authority in, or confers an authority upon, His Majesty in Council to issue certain regulations, which regulations when issued will create the undertaking of the prescribed Government authority. The effect of the Act appears to me to be that it authorizes His Majesty in Council to authorize an undertaking, which is not what is contemplated by the Lands Clauses Act when it speaks of an undertaking " authorized by any Act. ' As the undertaking of the Central Control Board was not brought into actual existence by the Defence of the Realm (Amendment) (No. 3) Act, 1915, and its powers and authority were not settled until the Defence of the Realm (Liquor Control) Regulations were issued, it is not possible to ascertain from the language of the Defence of the Realm (Amendment) (No. 3) Act, 1915, whether the Lands Clauses Act is incorporated or not. On this ground, therefore, I am of

opinion that the view taken by the learned judge in the Court below is not correct, but as I am differing not only from him but from the other members of this Court on this point, I naturally express my opinion with the greatest hesitation.

In the Court below and in this Court the matter has been treated as though the Act and the regulations were to be read together as constituting the special Act. I do not think that this is permissible, but assuming the view of the meaning of the expression in the Lands Clauses Act of "authorized by any Act" which I have expressed above to be incorrect, then it appears to me to follow that the Defence of the Realm (Amendment) (No. 3) Act, 1915, and the regulations must be read together for the purpose of ascertaining what the undertaking authorized by that Act is, because it is only by referring to the regulations that the form which the undertaking ultimately took can be ascertained. In its essential features that undertaking is one to which, as it seems to me, the clauses and provisions of the Lands Clauses Act cannot be applicable. The Lands Clauses Act is an Act in which an elaborate code is provided in cases where lands are purchased or acquired otherwise than by agreement for protecting at every step the position of persons interested in the lands.

It is not necessary to call attention to those provisions in detail. The principal ones are contained in the groups of ss. 16 to 68, 69 to 80, 84 to 92 and 108 to 114. Contrast the machinery thus provided with the machinery provided by reg. 7 of the Defence of the Realm (Liquor Control) Regulations, 1915. This regulation ignores the entire machinery of the Lands Clauses Act. No notice to treat is required. The elaborate provisions intended to secure the position of the parties interested if entry is made upon lands before payment of the price are dispensed with. Power is given to the Board by a stroke of the pen to free the lands they propose to take from any mortgages, rights, and interests affecting the same. At the expiration of ten days from the service of the notice the fee simple in possession of the premises vests in the Board.

What is the proper conclusion to be drawn from these facts? It must be either that the machinery thus created by the regulations is ultra vires because it is so absolutely inconsistent with the provisions of the Lands Clauses Act, or that the provisions of the

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Lands Clauses Act are not (to use the language of s. 1 of that Act) "applicable to such undertaking." In my opinion the latter is the correct view. Whether, therefore, the question has to be determined upon the language of the Defence of the Realm (Amendment) (No. 3) Act, 1915, alone, or by reading that statute and the regulations together as constituting the special Act, the conclusion I come to is that the Lands Clauses Act has no application to this case.

In the result, therefore, the respondents are not in my opinion entitled to the declaration in the form granted by Younger J., though I consider that they are entitled to a declaration which will establish their right to payment for the property which the Board have taken from them. How the value is to be ascertained is a matter which, unless the parties agree, must be referred back to the learned judge to decide.

EVE J. read the following judgment:—Although both at the trial and on the hearing of this appeal the Solicitor-General repudiated any intention on the part of the defendants to acquire the plaintiffs' property without paying for the same, his statements to this effect were so qualified as to negative any legal right in the plaintiffs to compel such payment, and in substance amounted to no more than this, that the appropriation by the defendants of the plaintiffs' property gave the latter a right to apply to the Defence of the Realm (Licensed Trade Claims) Commission for payment out of public funds of such a sum as ought in reason and fairness to be paid to them in respect of direct and substantial loss incurred by them by reason of interference with their property through the exercise by the defendants of their powers under the Defence of the Realm (Amendment) (No. 3) Act, 1915, which I shall hereafter refer to as "the Act." The same contention is raised in pars. 5 and 6 of the defence, and it involves a question of far-reaching importance between the State and the individual.

It is not, of course, denied that it would be competent for the Legislature to enact that the acquisition by the State of the property of an individual should give no legal right to any payment for the same and that the individual should be left to obtain such compensation (if any) as the State should think fit to award him,

but it has been strenuously argued that the intent, if it exists, to make so serious an encroachment on individual rights must be expressed in the plainest and most unequivocal language, and must not be left to be gathered from the assembling together of a patchwork of legislation contained in Acts of Parliament, amending Acts, regulations thereunder, and Orders in Council, and by extracting sections and clauses here and there and comparing the dates of the respective enactments, thereby arriving at the conclusion that there are some grounds for accepting the view that such a result may have been intended.

In order to appreciate if this argument can fairly be said to be provoked by the attitude of the appellants, it is necessary to examine in detail the successive stages of the argument by which that attitude is maintained.

It begins with an invitation to consider the atmosphere in which the Act was passed. It is pointed out that the Act received the Royal assent on May 19, 1915; that it contains no express provisions for the payment of compensation; that on March 31, 1915, a Commission had been issued to inquire and determine and to report what sums in cases not otherwise provided for ought in reason and fairness to be paid out of public funds to applicants (not being subjects of an enemy State) resident or carrying on business in the United Kingdom in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown of its rights and duties in defence of the Realm; that the regulations constituting the Central Control Board (Liquor Traffic) as the prescribed Government authority for the purposes of the control by the State of the sale and supply of intoxicating liquor were issued on June 10, 1915; and, finally, that on August 2, 1915, a further Commission was issued to inquire and determine and to report what sums, in cases not otherwise provided for, ought in reason and fairness to be paid out of public funds to applicants (not being subjects of an enemy State) who are resident or carrying on business in the United Kingdom in respect of direct and substantial loss incurred by them by reason of interference with their property or business in the United Kingdom through the exercise by the Liquor Traffic Control Board of their

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powers under the Act; and it is submitted that when these various enactments are pieced together and their chronological sequence appreciated the conclusion is inevitable that they were intended to embody a code for regulating the rights and determining the remedies of all persons incurring direct and substantial loss through the exercise of any of the powers conferred upon the Board.

Before acceding to the soundness of this submission and the conclusion it leads to, it is well to ascertain with a little more particularity what it really involves.

First and foremost it seems to me to involve this—that we must construe the Act as an Act whereby it was intended that the property of the individual should be confiscated for the benefit of the public without compensation. I am quite conscious that this result is repudiated by the appellants, but, unless all right to compensation under the statute is first eliminated, the condition precedent necessary to bring the matter within the purview of the Commissions of March 31 and August 2 is never fulfilled. Those Commissions are limited in terms to cases not otherwise provided for, and the Commissioners, as is disclosed in each of the three Reports they have already made, adhere closely to this construction of their powers and refuse to entertain any application by applicants who are not prepared to proceed on the footing that they have no other remedy or means for obtaining payment of their claims. With great respect, therefore, I cannot but regard the arguments which admit the existence of a statutory right to compensation and at the same time maintain that the only method of obtaining that compensation is by recourse to the Commission as mutually destructive. If the true and only remedy of the owner whose premises have been acquired by the Board and vested in trustees for them is recourse to the Commission, it follows, I think, that the Act must be construed as authorizing the Board to acquire the premises without any obligation to pay for them.

Before turning to consider whether this is the construction we ought to place on the Act, I pause to make this observation, that the language of the Commissions in relation to the grounds upon which applicants may claim compensation thereunder is unfortunately deficient if it was really intended to include claims for purchase-moneys of premises acquired by the Board; "interference

with their property" hardly appears to me appropriate terminology for a process of expropriation.

In embarking on the inquiry as to the true construction of the Act it must not be overlooked that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it: see Brett M.R. in *Attorney-General* v. *Horner*. (1) Lord Davey in *Commissioner of Public Works (Cape Colony)* v. *Logan* (2) says: "Such an intention"—he is referring to an intention to take away property without compensation—"should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognised by the Courts of this country as a canon of construction." And to the same effect are the observations of Bowen L.J. in *London and North Western Ry. Co.* v. *Evans* (3), where he says: "The Legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him." It is a doctrine "of sound sense and obvious justice, to be borne in mind in dealing with legislation, which cannot be supposed, unless it so explicitly states, ... to neglect what is natural justice. . . . ."

The Act, as I have already pointed out, makes no mention of compensation; on the other hand, it certainly contains nothing to support the view that property can be compulsorily acquired thereunder without compensation. Prima facie, therefore, it is intended that compensation shall be paid. Is there anything in the Act to rebut this presumption? I think not; on the contrary I think the provision authorizing the acquisition compulsorily or by agreement leads irresistibly to the conclusion that compensation is to be paid whichever mode of acquisition is resorted to.

From this it results that the compulsory acquisition of premises pursuant to the Act gives the owner a legal right to compensation, and, as the possession of that right disqualifies him as an applicant for compensation under the Commission in that his case is "other-

(1) 14 Q. B. D. 257. (2) [1903] A. C. 363.
(3) [1893] 1 Ch. 16, 28.

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wise provided for," the final question which emerges is, How is such compensation to be ascertained ? The plaintiffs contend, and the learned judge has held, by means of the Lands Clauses Consolidation Act, 1845. To this the appellants raise several objections, two of which go to the root of the matter, the others for the most part being in the nature of an accumulation of inconsistencies and difficulties which a critical examination of the regulations made under the Act and the procedure thereby contemplated is said to disclose if the Lands Clauses Act be applied to a transaction of this particular nature.

I confess that personally I am not impressed with objections of this latter class. It may be that by the regulations the Board is empowered to acquire compulsorily property other than land, and that presumably the Lands Clauses Act could have no application in those circumstances ; but before feeling competent to express an opinion on such a transaction one would need to have seisin of all the facts, and possibly the opportunity of considering whether these regulations may not in some respects purport to extend the scope of the Act. Again, I do not myself appreciate how the existence of some situations brought about by the Act and regulations for which no compensation is provided, and which, therefore, necessarily involve recourse to the Commission or some other procedure if a claim for compensation is advanced, affords any true or appropriate gauge for measuring the rights of an owner who has a legal right to compensation. The positions are too fundamentally distinct to be comparable, and in this case I think the plaintiffs are entitled to insist that their legal rights should be determined without reference to what may be the rights of others in circumstances to some extent, it may be, analogous but still essentially different, and I do not think it would be doing justice to the plaintiffs to give effect to any argument founded upon a comparison of the position in which they are placed by the judgment and that of others to whom, it is contended, the attainment of a similar position is manifestly impossible.

But these observations have, of course, no application to the two other objections to which I have alluded. They raise the points that the Lands Clauses Act has no application, first, because the Board is the Crown, and, secondly, because there is no undertaking authorized and there are no promoters empowered under the Act.

I think the first of these points is concluded by the judgment of this Court in *In re Wood's Estate.* (1) Some criticisms were addressed to us on the judgments therein of Lord Esher and Lopes L.J., but although the attention of the Court had been directed to the judgment of the Exchequer Chamber in *Reg.* v. *McCann* (2), Lindley L.J. declined to treat that case as any authority for the proposition that the respondent corporation, " a public body incorporated for certain public purposes," was to be treated as the Crown, and disposed of the point in terms not open to the above-mentioned criticism, and which, in my opinion, completely cover the case with which we have to deal here.

Finally, I think the control of the sale and supply of intoxicating liquor in any prescribed area, including as it does powers to acquire temporarily or permanently any licensed or other premises or business or any interest therein and, without licence, to establish and maintain refreshment-rooms for the supply of refreshments, and if thought fit of intoxicating liquor to the general public or to any class of persons or to persons employed in any particular industry (see pars. (*b*) and (*c*) of sub-s. 2 of s. 1 of the Act), can properly and rightly be described as " an undertaking," and the Board as the persons empowered to execute, and therefore as " the promoters of," the undertaking within the meaning of s. 2 of the Lands Clauses Act.

On all grounds, therefore, I think that the judgment of Younger J. was right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors : *Boulton, Sons & Sandeman ; Travers-Smith, Braithwaite & Co.*

(1) 31 Ch. D. 607. (2) (1868) L. R. 3 Q. B. 677.

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Feb. 15—18; *May* 14.

In re ATKINSON.

PYBUS *v.* BOYD.

[1915 A. 1657.]

Will—Construction—Gift to "Children" of deceased Person—No Children living at Date of Will—Grandchildren living at Death of Testator—Intestacy.

There is no fixed rule of construction that, if a legacy is given to "children" of a person who was known by the testator to be dead at the date of the will and to have no child then living, grandchildren will take. The question must always be one of construction of the particular will.

Crooke v. *Brookeing* (1689) 2 Vern. 106; *Fenn* v. *Death* (1856) 23 Beav. 73; and *In re Smith* (1887) 35 Ch. D. 558, where it differs from the principles of *In re Kirk* (1885) 52 L. T. 346, are not authority.

By her will, dated August 19, 1914, Jane Atkinson, after bequeathing certain legacies, devised and bequeathed to the plaintiffs, whom she appointed executors, her residuary estate on trust (clauses 6, 7, and 8) to hold three equal fifth parts respectively on trust for such of the children of three deceased cousins as should be living at her death, and, if all should be then dead, for such remoter issue, per stirpes and not per capita, as should be then living. She then proceeded (clause 9): "Subject to the trusts aforesaid my trustees shall hold my residuary estate upon trust to divide the same in equal shares per capita and not per stirpes absolutely among such of the children of my late uncles Thomas Liddell William Liddell and my late aunts Jane Carr and Ann Arkley (brothers and sisters of my mother) as shall be living at my death." She died on November 30, 1914. At the date of her will there were no children living of either Thomas Liddell, William Liddell, Jane Carr, or Ann Arkley. There were six grandchildren of William Liddell, seven grandchildren of Jane Carr, and three grandchildren of Ann Arkley living at her death, and many remoter descendants.

The plaintiffs took out a summons to determine (inter alia) whether the grandchildren were entitled to the two-fifths, dealt with in clause 9, of the residuary estate, or whether there was an intestacy.

W. J. Whittaker, for the plaintiffs.

J. G. Wood, for grandchildren. The grandchildren take under the gift to "children," there being no child living at the date of the will: *In re Smith.* (1) There is no use of the word "grandchildren" in this will.

C. E. Bovill, for another grandchild, supported the same argument, and referred to *Crooke* v. *Brookeing* (2), *Berry* v. *Berry* (3), and Hawkins on Wills, 2nd ed. p. 113.

A. Beddall, for another person in the same interest, referred to *Fenn* v. *Death.* (4)

C. W. Turner (for *R. Roope Reeve*, serving with His Majesty's Forces), for persons in an opposite interest. Grandchildren are not included under "children": Jarman on Wills, 6th ed. vol. ii. pp. 1656, 1657. To bring in grandchildren, it must be proved that the testatrix knew all about the state of the family, and that there were in fact none but grandchildren to whom the word "children" could apply: *Crook* v. *Whitley.* (5) Here the evidence is quite insufficient.

F. Whinney, for other persons.

[At the conclusion of the argument, YOUNGER J. decided that in this will grandchildren could not be included in the term "children," and that accordingly the testatrix had died intestate as to two-fifths of the residue. He stated, however, that he would, after a further examination of the authorities, state his reasons for that decision on a future occasion, which he now did.]

May 14. YOUNGER J. That offspring in the first degree is the natural and ordinary signification of the word "children" was not disputed at the Bar, nor is there anything in this will to indicate that it is there used in any other sense. On the contrary, in the three clauses of the will immediately preceding that now in question, in each of which the testatrix disposes of one-fifth of her residuary estate, it is clear that it is in that ordinary sense, and in no other, that the testatrix employs the term "children," the words being in each clause contrasted with the "remoter issue" of the same person. I

(1) 35 Ch. D. 558.
(2) 2 Vern. 106.
(3) (1861) 3 Giff. 134.
(4) 23 Beav. 73.
(5) (1857) 7 D. M. & G. 490.

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will read clause 6 as representative of all three : " My trustees shall hold one equal fifth part of my residuary estate upon trust for such of the children of my late cousin Isabella Watt as shall be living at my death absolutely in equal shares between them and if none of such children shall survive me then upon trust for such remoter issue of the said Isabella Watt as shall be living at my death absolutely in equal shares between them per stirpes and not per capita." In that clause, as in clauses 7 and 8, the testatrix is benefiting the children living at her death of one cousin dead at the date of her will, and she carefully provides for a stirpital division amongst the remoter issue of the cousin in case all the children have predeceased herself. In clause 9, however, the testatrix is dealing as one class with the children of four deceased uncles and aunts ; these children living at her death are to take equally per capita and not per stirpes ; and there is no provision for their remoter issue at all in the event of all being at that time dead. The similarity between this clause and each of the three which precede it is therefore striking. The dissimilarity is, however, no less striking. And yet I am, in effect, asked by those representing the grandchildren to read the clause as if that dissimilarity did not exist, and as if there were to be read into this clause a provision not there which, in the case of each of the three immediately preceding, the testatrix, in precisely analogous circumstances, thought it necessary to insert.

It appears to me that, if the question be one of the construction of this particular will, such a course is inadmissible. But I am further asked to attribute to the word " children " in clause 9 not only an unusual signification, but one at variance with the natural and ordinary meaning which, again under precisely analogous circumstances, is demonstrably attributed to it in each of these three preceding clauses. This again, it appears to me, if the question be one of the construction of this particular will, is a thing that I cannot do.

It was, however, urged that the question to be solved does not really depend upon the terms of a particular instrument, but that we are here in the presence of a rule of construction, the rule being that, if in such a case as the present there are at the date of the will no children strictly so called in existence and this fact is known to the testator, and if from the nature of the case, as here, no such

children can thereafter come into existence, then grandchildren will take under a gift to "children" so that an intestacy may not supervene.

It may be doubted whether any authority short of a deliberate deliverance of the House of Lords to that effect would be sufficiently august to establish a rule in its scope at once so comprehensive and so strangely restricted—for remoter issue are not within it. It may be said at once that no such deliverance exists. Such foundation, indeed, as there is for the so-called rule is of the slenderest description. It is to be found, if at all, in a dictum in the case of *Crooke* v. *Brookeing* (1), which has, it must be admitted, received an amount of consideration in subsequent cases hardly justified either by the imperfect report in Vernon or by the circumstances of the case. There the testator by his will made on February 15, 1651, gave 1500*l.* to his brothers Simon and Joseph Snow for such uses as he had declared to them and by them not to be disclosed. On November 17, 1652, after the testator's death, Simon in a letter to Joseph stated that the trusts were to provide maintenance for Anne Crewe during her husband's life, and if, as happened, the husband survived her the money was to go among the children of her sister Grace as she, Anne, should advise. Anne died in 1684 leaving her husband surviving, having made no appointment. At her (Anne's) death Grace had one child living, the plaintiff; five others had died intestate since the testator's death. The Lords Commissioners, overruling the Lord Chancellor Jefferies, held that the plaintiff, as the only child living at the death of Anne, was entitled to the whole. The judgment as reported is short. "Where the devise is to children, the grandchildren cannot come in to take with the children; and turn it into latin, and children and grandchildren are exprest by distinct and different words: but all admitted that if there had been no child, the grandchildren might have taken by the devise to *his* "—the italics are mine—"children." It is upon these last words that the so-called rule now being considered is said to be founded. That they are a mere dictum is of course clear; that they are inaccurately reported, at least in one obvious respect, is equally plain. It is noticeable also that the result which in a particular event they purport to describe is not the result of a phrase

(1) 2 Vern. 106, 107.

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found in a carefully framed instrument, but is that of a passage contained in a mere informal communication made by one trustee to another explaining the parol trust on which a fund was held by the two. Certainly it may be doubted whether a dictum of such doubtful authenticity, prompted by a phrase in a document so homely, has ever before been invoked as the foundation of an artificial rule of construction of universal application.

But that is not all. The dictum goes far beyond the rule it is supposed to justify, comprehensive as that rule is. Consider the facts in *Crooke* v. *Brookeing* (1) as disclosed in the report. There is nothing there to show that Grace was dead at the date of the will; there is indeed nothing to show that she was not still living at the death of Anne. It is moreover quite clear that both at the date of the will and at the testator's death there were living children of Grace properly so called. Presumably, therefore, the dictum, if it means anything, means that in *Crooke* v. *Brookeing* (1), even in these circumstances, the grandchildren of Grace living at Anne's death would have taken if only the plaintiff had then been dead. But it has never in any subsequent case even been suggested that grandchildren or remoter descendants of A. can, as a mere matter of construction, take under a gift to the children of A. if either A. is living at the date of the will or if there are then children living of A. then dead. Indeed, I can find no case in which the so-called rule has been applied where A. has not in the will been described as dead, and certainly no case in which its applicability has been suggested where there were children of A. living at the date of the will. In truth the dictum has apparently never been applied in any circumstances even remotely analogous to those in reference to which it was propounded.

But, notwithstanding, its authority has in a vague way survived even to this day, although it will not, I think, be found that there is judicial warrant for the compendious phrase in which its effect is sometimes stated—that a gift to children extends to grandchildren where there is no child. Indeed, any judicial authority for the supposed rule is extraordinarily scanty. *Fenn* v. *Death* (2) is perhaps the most express. There the gift was "in trust for the children of my late mother's half-brother, Thomas Death." Thomas Death and all

(1) 2 Vern. 106. (2) 23 Beav. 73.

his children were dead at the date of the will; there were then living both grandchildren and great-grandchildren of Thomas. There was apparently no evidence that the testator knew that the children were all dead. Sir J. Romilly M.R., however, applying the supposed rule, held that the grandchildren were entitled and the great-grandchildren excluded. That case, however, can, I think, no longer be regarded as an authority. First of all, it is clear that the rule cannot apply unless it is affirmatively established that the testator knew, when he made his will, that all the children properly so called were then dead, and such knowledge will not be presumed: *Crook* v. *Whitley*. (1) Secondly, to exclude great-grandchildren in such a case is contrary both to principle and to authority. "The principle which extends the limitation to the grandchildren must as I conceive," says Turner L.J. in *Pride* v. *Fooks* (2), "extend it also to the more remote issue. I can see no ground on which the limitation, if it extends beyond the children, can be confined to the grandchildren, or on which the great-grandchildren mentioned in the course of the argument can be excluded." And in the present case, if I may make this digression, I can see no ground upon which, if the grandchildren were included, the great-grandchildren of the uncles and aunts could be excluded. *Berry* v. *Berry* (3), before Stuart V.-C., is perhaps the next strongest authority. There the gift was to the "children of my late brother John." John had two sons, both dead at the date of the will—a fact known to the testator. There were four grandchildren then living. Elsewhere in his will the testator referred to the "issue" of his late brother. There on that will Stuart V.-C. held the grandchildren entitled. But his language is very cautious. "'Children' may mean grandchildren where there can be no other construction, but not otherwise."

I believe that these, so far, are the best authorities that can be adduced in support of the so-called rule. They do not carry it very far; and its true limits were, I think, authoritatively laid down by Pearson J. in his considered judgment in *In re Kirk*. (4) In that case one share of residue was given by a testator to the children of his late brother William, another to the children of his late brother James, and so on. There were living at the date of the will children

(1) 7 D. M. & G. 490.
(2) (1858) 3 De G. & J. 252, 275.
(3) 3 Giff. 134, 137.
(4) 52 L. T. 346, 348.

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of William, and grandchildren, but no children (as the testator knew) of James. Pearson J. held that grandchildren of James did not take. After discussing the authorities in detail, he says: "I come to the conclusion, therefore, on the authorities, that it is clear that I cannot substitute 'issue' or 'grandchildren' for 'children' merely on the ground that at the date of the will or testator's death the named person has no child living, but only grandchildren; and that I can only alter the word 'children' from its proper meaning if on a proper construction of the will itself it is found to have been intended to bear a larger signification. Here I am unable to find any such intention; for, as I have said, the first fourth share is plainly given to the children of the one brother; and I do not see how I can alter the principle of construction when I come to consider the gift to the 'children' of the second brother. I may add that I agree in this case with Turner L.J.'s opinion in *Pride* v. *Fooks* (1), as to the difficulty there of excluding great-grandchildren. If I say that 'children' does not mean children, how can I say that it means grandchildren or great-grandchildren, or both? The true rule is, that a gift in a will to 'children' must be construed as a gift to children literally, and nothing else, unless from the will itself and the context it appears that the word is intended to have a larger meaning." This case shows, one might have hoped finally, that we are here in the presence of no hard and fast rule; that the question is never more than one of construction of the particular instrument; that the word "children" must have its natural signification attributed to it in all cases unless from the will itself and the context it appears that the word is intended to have a larger meaning, or unless, as may be added, by the application of a principle not limited to the word "children," the word is in a proper case carried beyond its ordinary signification from the want of any persons more accurately answering to the description—a course necessary to prevent its being imputed to a testator that he made a gift without having in his mind any actual or possible object or subject of it.

Somewhat unfortunately, however, if I may very respectfully say so, the matter again arose in the case of *In re Smith* (2), where Kay J. in a case exactly similar to that of *In re Kirk* (3)—which,

(1) 3 De G. & J. 275. (2) 35 Ch. D. 558, 559.
(3) 52 L. T. 346.

however, was not cited to him—decided in favour of the grandchildren, and in the course of his judgment made some observations which were utilized by Mr. Wood as the real foundation of his argument here. He there says: "The law seems to stand thus. If the testator on the face of his will gives a legacy to the children of a deceased person, mentioning that person as being dead, and at the date of the will there are no children of that person, but there are grandchildren, then the Court, on the principle ut res magis valeat, holds that the gift takes effect in favour of the grandchildren." It will be noted that in that case Kay J. purported to proceed upon authority. I have, I hope, showed that for the proposition so widely stated by him there was then no sound authority. I feel sure he would not have said there was had Pearson J.'s judgment in *In re Kirk* (1) been brought to his notice. And I cannot help saying that, in my judgment, *In re Smith* (2), where it differs from the principles laid down in *In re Kirk* (1), ought not to be followed.

Accordingly, we are here, as I think, confronted by no special rule governing the determination of this particular question. The principles of construction applicable to it are of universal application where they are relevant, and decisions subsequent in date make it clear that nothing in *Crooke* v. *Brookeing* (3) now remains to justify the further citation of that case as an authority for anything.

I may add that in the present case an attempt was made to show that at the date of her will the testatrix knew that all the children of the uncles and aunts were dead. That attempt in my opinion failed.

It was for all these reasons I was constrained to hold that the testatrix died intestate as to the two-fifths of the residue now in question.

Solicitors: *Stibbard, Gibson & Co. for Gibson, Pybus & Pybus, Newcastle-upon-Tyne; Beamish, Hanson, Airy & Co.; Gibson & Weldon, for T. W. D. Spence, South Shields; Doyle, Devonshire & Co., for Hannay & Hannay, South Shields.*

(1) 52 L. T. 346. (2) 35 Ch. D. 558.
(3) 2 Vern. 106.

A. L.

SARGANT J.

1918

May 28.

In re SAVAGE.

CULL *v.* HOWARD.

[1917 S. 2462.]

Administration—Specific Legacy of Stocks to Debtor to Testatrix—Claim by Executor of Right of Retainer.

S. by her will specifically bequeathed sums of colonial stocks to H., who had borrowed 500*l.* from S. and had not repaid it, and whose debt was statute-barred:—

Held, that, as what the executor of S. held was not money—although it was something easily turned into money—he had no right to retain the amount of the debt out of the stocks.

Notwithstanding the observations of Kekewich J. in *In re Akerman* [1891] 3 Ch. 212, the right of an executor where a legacy has been given to a person owing money to the testator is properly called a right of "retainer."

Annie Savage, spinster, by her will, dated July 30, 1896, made a bequest in the following words: "I give, devise, and bequeath to Alice Kate Howard, wife of Walter Howard . . . . my investment of 400*l.* and 300*l.*, together 700*l.*, Queensland stock, and 450*l.*, Victoria Inscribed Government stock, in all 1150*l.*, for her sole use and benefit absolutely." And, after making other bequests, the testatrix gave her residuary estate to Anne Stevens Cull, with a proviso that, if she should predecease the testatrix, the residue should go to her children living at the decease of the testatrix.

Mrs. Howard had been an intimate friend of the testatrix for over fifty years, and in 1903, being in financial difficulties, she borrowed 500*l.* from the testatrix, and gave her a promissory note for that amount, dated June 9, 1903. She paid interest on the sum borrowed in 1904, but gave no later acknowledgment of the debt. After the failure of Mrs. Howard's business in 1904, according to Mrs. Howard's evidence, testatrix never asked for payment of the principal or interest; but, when staying with Mrs. Howard in July, 1911, told her that she "need not worry about the promissory note, as on her return home she would destroy the same." After the death of the testatrix, her executor, Thomas Cull, found the promissory note with stock certificates and securities of hers at her bankers.

Anne Stevens Cull died in 1908, leaving several children, some

of whom survived the testatrix, who herself died in 1917. The executor took out an originating summons, to which Mrs. Howard, Mrs. Cull's children, and another person were defendants, for the determination (inter alia) of the question whether he ought to retain any, and what, portions of the Victoria and Queensland stocks specifically bequeathed to Mrs. Howard to satisfy her indebtedness to the estate under the promissory note.

J. Israel, for the plaintiff, stated the facts and the question for decision.

Romer, K.C., and *Ashton Cross*, for Mrs. Howard. The question is whether the executor can retain a portion of colonial stock specifically bequeathed to Mrs. Howard to satisfy her statute-barred debt to the testatrix. It has been held that the fact that the debt is statute-barred is immaterial: *In re Akerman* (1); *In re Milnes* (2); but the former case shows that there is no right of retainer in respect of a debt owing from a specific legatee to his testator's estate or from a specific devisee of freeholds or leaseholds. And in *In re Taylor* (3) Chitty J. says that the law is settled that the right of retainer does not exist where there is a specific devise, a specific bequest of leaseholds, or in the case of specific chattels, inasmuch as "the two things cannot be measured one against the other." The same reason applies in the case of a specific gift of stock. Where executors have set apart and appropriated assets to meet a legacy, the right of retainer does not exist as against a debt due from the legatee: *Ballard* v. *Marsden.* (4)

[SARGANT J. referred to *In re Peruvian Railway Construction Co.* (5) and *In re Dacre.* (6)]

If Mrs. Howard was bound to contribute at all in respect of her debt, it was to the residue, and in that she had no interest. There is also evidence that the debt was forgiven or released by the testatrix herself.

[SARGANT J. The evidence as to this is insufficient.]

Rolt, K.C., and *Dighton Pollock*, for the residuary legatees. The

(1) [1891] 3 Ch. 212.
(2) (1885) 53 L. T. 534.
(3) [1894] 1 Ch. 671, 674.
(4) (1880) 14 Ch. D. 374.
(5) [1915] 2 Ch. 144, 442.
(6) [1915] 2 Ch. 480; [1916] 1 Ch. 344.

SARGANT J. residuary legatees say that the executor has the right of retainer. The executor is entitled to say to the legatee: "You owe the estate a debt and I have a fund belonging to you, and I am going to take the amount of the debt out of that fund." That is doing no more than relying on the maxim that he who seeks equity must do equity: *Courtenay* v. *Williams*. (1) It is true, as stated by Lord Cottenham L.C. in *Cherry* v. *Boultbee* (2), that the right of payment by the executor to himself can only arise where there is a right to receive the debt so to be paid, and the legacy or fund to be applied in its payment is payable by the person entitled to receive the debt; but the legacy or fund need not be a money fund. It is sufficient if the thing given by the will, though not cash or money in the strict meaning of the word, is readily convertible into money, as these stocks are. The case of a devise of a house or the gift of a specific chattel is different from a legacy of stock. One cannot easily sell a bit of a house, but a bit of stock is sold every day. A debt could not be retained out of a diamond bequeathed to the debtor, but a diamond has characteristics beyond its money value. [They also referred to *Campbell* v. *Graham*. (3)]

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SARGANT J. (after stating the facts). The question is whether the executor can retain the Queensland and Victoria stocks to satisfy Mrs. Howard's indebtedness to the testatrix.

Notwithstanding what was said by Kekewich J. in *In re Akerman* (4), I think that the right, where it exists, is properly called one of "retainer." In *Cherry* v. *Boultbee* (2) Lord Cottenham L.C. says: "It must be observed that the term 'set-off' is very inaccurately used in cases of this kind. In its proper use, it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate, is rather a right to pay out of the fund in hand, than a right of set-off." "Pay out of" there means pay himself out of. Lord Cottenham then says: "Such right of payment, therefore, can only arise where there is a right to receive the debt so to be paid; and the legacy or fund, so to be applied in payment of the debt,

(1) (1844) 3 Hare, 539, 554; affirmed (1846) 15 L. J. (Ch.) 204.
(2) (1839) 4 My. & Cr. 442, 447.
(3) (1830) 1 Russ. & My. 453.
(4) [1891] 3 Ch. 212.

must be payable by the person entitled to receive the debt." You can, therefore, only exercise the right of retainer in respect of a debt which is due and against a cross-payment to the debtor.

In *In re Akerman* (1) Kekewich J. held that the right—he objected to the expression " right of retainer "—applied not only where the debtors to the estate were entitled to shares in the residuary personalty but also where they were entitled to share in the proceeds of the residuary realty—there being there a common residue of proceeds of conversion of realty and personalty. But he recognized that there was no right of retainer out of a specific legacy or out of a specific gift of freehold or leasehold property. On the other hand, throughout his judgment in *In re Taylor* (2) Chitty J., although *In re Akerman* (1) had been cited to him, deliberately used the expression " right of retainer " or " doctrine of retainer." He says: " The law is settled that as against a specific devise which is outside the duties of the executors there is no retainer. It is equally plain that in the case of a specific bequest of leaseholds there is likewise no right of retainer. The two things cannot be measured one against the other, and the same rule prevails also in the case of specific chattels. If in such cases the right did exist it would be, not a right of retainer, but of lien." Here Chitty J. recognizes what is laid down by Lord Cottenham in the passage which I have quoted from *Cherry* v. *Boultbee* (3), that to have the right of retainer there must be money in the shape of a debt on the one side and money on the other side. If what the executor holds for the legatee is not money, he cannot pay himself the debt out of it by way of retainer, and admittedly he has no right of lien.

Mr. Rolt has argued that the stock can easily be sold, and therefore that incommensurability does not exist here. His argument is ingenious, but inconsistent with what has been laid down in previous cases. You must have money payable against money payable, and the fact that the gift to the debtor is something like money, or something which may be easily turned into money, does not give the executor the right claimed. Some chattels have in fact a more definite, ascertainable and realizable money value than some stocks or shares.

(1) [1891] 3 Ch. 212, 219. (2) [1894] 1 Ch. 671, 674.
(3) 4 My. & Cr. 442, 447.

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I hold, therefore, that the executor in this case is not entitled to retain the stocks bequeathed to Mrs. Howard, or any part of them, against her debt to the testatrix.

Solicitor for plaintiff and residuary legatees: *Bertie F. Browne.*
Solicitor for Mrs. Howard: *T. H. Hiscott.*
Solicitor for other defendant: *A. J. Carruthers.*

F. E.

SARGANT J. 1918 *Feb.* 7.

In re ELLIOTT.

PUBLIC TRUSTEE *v.* PINDER.

[1917 E. 699.]

Will—Accumulations—Provision for raising Portions—Accumulations Act, 1800 (39 *&* 40 *Geo.* 3, *c.* 98), *s.* 2.

Testator, who died in 1891, by his will directed his trustees to pay the income of his residuary estate to his wife during her life, and that after her death they should set apart out of the investments thereof the sum of 8000*l.*, and out of the interest on that sum should pay his daughter an annuity of 60*l.* per annum for her life; and he directed the remainder of the interest to be added to the principal sum, and that after the daughter's death the trustees should hold the 8000*l.* and the accumulations thereon upon trust to pay the income thereof to M. P., the daughter's only child, and that after her decease the fund should fall into the testator's residuary estate. The widow died in 1917:—

Held, that the trust for accumulation after the widow's death was not a "provision for raising a portion" within s. 2 of the Accumulations Act, 1800, and was invalid.

Middleton v. *Losh* (1852) 1 Sm. & Giff. 61 not followed.

THOMAS WILLIAM ELLIOTT, by his will, dated October 31, 1890, devised and bequeathed all the residue of his estate and effects of any description to his trustees, upon trust to convert the same, and out of the proceeds to pay his funeral and testamentary expenses and debts and certain pecuniary legacies, and after payment thereof the testator directed his trustees to invest the residue of the moneys and to stand possessed of his residuary trust moneys and the investments representing the same, in trust to pay the income thereof to his wife during her life. The will then continued as follows: "And

from and after her decease I direct my said trustees to set apart out of the said investments a sum of 8000*l.*, and out of the interest on the said sum of 8000*l.* to pay to my daughter Eliza Martha Pinder, for her separate use for life, the sum of 60*l.* per annum, in four equal quarterly instalments, without any power of anticipation on her part; and, as to the remainder of the interest on the said sum of 8000*l.*, I direct the same to be added to the principal sum, and from and after the decease of the said Eliza Martha Pinder to hold the said sum of 8000*l.* and the accumulations thereon for the benefit of my granddaughter, Marian Pinder, the only child of my said daughter, Eliza Martha Pinder, upon trust to pay the dividends, interest, and annual produce of the said trust funds to her for her life; but, in the event of my said granddaughter marrying with the consent of her parents or of her guardians hereinafter named, then I direct my trustees, if my said granddaughter and her intended husband shall thereto consent, to pay and transfer the said sum of 8000*l.* and the accumulations thereof to any person or persons who may be appointed trustees of a settlement to be executed on my said granddaughter's marriage, provided the said settlement shall provide for my said granddaughter having a life interest in the said trust fund. And I direct my trustees, if such settlement is executed, to pay and transfer the said fund to the trustees of the said settlement freed and discharged of the proviso next hereinafter contained—that is to say, in the event of my said granddaughter, Marian Pinder, not marrying or marrying without a settlement, then, from and after her decease, the said trust fund shall fall into and form part of my residuary estate," which, in the events that happened, passed under the trusts of the will to the testator's grandson, Harold Percy Bell.

The testator died on May 7, 1891. In December, 1914, the testator's widow appointed the Public Trustee to be a trustee of the will, together with herself. The testator's widow died on May 17, 1917, leaving the daughter Eliza Martha Pinder and the granddaughter Marian Pinder her surviving. The Public Trustee took out an originating summons, to which Marian Pinder and H. P. Bell were joined as defendants, raising the following question: "Whether the direction in the said will, after the death of testator's widow to set apart 8000*l.*, and, after payment of an annuity of 60*l.* to Eliza Martha Pinder, to add the remainder of the interest to the principal,

SARGANT J. 1918 ELLIOTT, *In re.* PUBLIC TRUSTEE *v.* PINDER.

and after the decease of the said Eliza Martha Pinder to hold the sum of 8000*l.* and the accumulation thereon for the benefit of Marian Pinder, was valid as to accumulating the income, having regard to the exemption as to portions in s. 2 of the Accumulations Act, 1800, and notwithstanding that the testator's widow survived him for more than twenty-one years."

Mossop, for the plaintiff, stated the facts and the question involved.

Edward Beaumont, for Marian Pinder, the granddaughter. This is a provision for raising a "portion" for the daughter of Eliza M. Pinder, within the meaning of the proviso at the end of s. 2 of the Thellusson Act, and the previous provisions of that Act against accumulations are, therefore, not applicable: *Middleton* v. *Losh*. (1) [He also referred to *Wildes* v. *Davies* (2), *Barrington* v. *Liddell* (3), *Burt* v. *Sturt* (4), *Jones* v. *Maggs* (5), and *Watt* v. *Wood*. (6)]

Owen Thompson, for the residuary legatee. This is not a provision for "raising portions" within the meaning of the proviso to s. 2; it is a provision for augmenting the capital amount of a settled legacy for the benefit of the grandchild Marian Pinder. In *Barrington* v. *Liddell* (3) there was a clear provision for a portion; and *Middleton* v. *Losh* (1) was decided under a misapprehension of the principle acted on in *Barrington* v. *Liddell* (3), and is inconsistent with previous authorities: *Burt* v. *Sturt*. (7) In order that a case should come within the proviso it is necessary that the portion should be "raised": *Watt* v. *Wood* (6); Jarman on Wills, 6th ed. vol. i. pp. 383 et seq. In the ordinary case of a settled legacy, of either a residue or a specific sum, a direction to accumulate income so as to augment the fund is within the mischief aimed at by the statute. [He also referred to *Eyre* v. *Marsden* (8), and *Morgan* v. *Morgan*. (9)]

Beaumont in reply. Here the whole income of the 8000*l.* is not directed to be accumulated, but only the income after providing the annuity for the grandchild's mother.

(1) 1 Sm. & Giff. 61.
(2) (1853) 1 Sm. & Giff. 475.
(3) (1852) 2 D. M. & G. 480.
(4) (1853) 10 Hare, 415.
(5) (1852) 9 Hare, 605.
(6) (1862) 2 Dr. & Sm. 56.
(7) 10 Hare, 415, 420, 421.
(8) (1838) 2 Keen, 564.
(9) (1851) 20 L. J. (Ch.) 109, 111.

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SARGANT J. The summons in this case raises the question whether the direction in the will to accumulate the balance of the income of a sum of 8000*l.* remaining after payment of an annuity is bad under the Thellusson Act. [His Lordship read the material parts of the will, and continued:] The testator died in 1891 and his widow in 1917, and, as she survived the testator for twenty-six years, the period for accumulation allowed by s. 1 of the Act came to an end before the 8000*l.* was payable, and, unless the case comes within the proviso contained in s. 2 of the Act, the direction to accumulate the balance of income is void.

Sect. 2 of the Thellusson Act, or, as the Short Titles Act, 1896, enables it to be cited, "The Accumulations Act, 1800," is as follows: "Provided always, and be it enacted, That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this Act had not passed."

The question which I have to determine is whether this direction for accumulation after the widow's death and during the lifetime of the daughter is a provision for "raising" a portion for the grandchild within the meaning of the proviso in s. 2. In the first place there can be no question that the grandchild Marian Pinder was a child of a person taking an interest under the settlement or devise within the meaning of s. 2; for her mother, Eliza Martha Pinder, was given an annuity of 60*l.* out of the interest on the settled sum of 8000*l.* Further, though the term "portions" referred to in s. 2 may have been originally used to denote sums raised out of real estate for the younger brothers and sisters of the eldest son who took the real estate, yet it is clear that the term as used in the Act is not confined to portions out of real estate. But, then, is the direction to accumulate the surplus income (after providing the annuity) of this specific sum of 8000*l.* for the benefit of the testator's granddaughter Marian Pinder a provision for raising a portion? It is reasonably clear, on s. 2 of the Act, from the collocation of debts

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and portions, that the section is making provision for clearing off incumbrances, and that the provision for "raising portions" points to the creation of a subsidiary fund out of and less than a larger one composed of an original fund and the accumulated interest thereon. Again, what the phrase "raising portions" in itself suggests is raising a fund out of a larger fund. And what Mr. Owen Thompson says against the contention that this provision for Marian Pinder is a provision for raising a portion is that the direction in the will is for augmenting the whole settled fund by the addition of accumulations and then for handing over to her the whole of the settled fund as so augmented, and that if that is the true effect of the provision in the will, the case falls precisely within the mischief aimed at by the Act, namely, that it is increasing the capital for a legatee by accumulating the interest during a longer period than that allowed by the Act. I entirely agree with that view.

There is a considerable amount of authority on this subject, but apart from one case it is all in one direction. The first case I will refer to is *Eyre* v. *Marsden*. (1) There the direction to accumulate was with regard to residue and was held to be void, and the reasons given by Lord Langdale for so holding were, first, because two of the legatees were not the children of any person taking an interest under the will, and, secondly, because the direction was not a provision for raising portions, but a provision for making additions to the capital for the purpose of making one gift of an aggregate fund. That second reason is conclusive in the present case unless it has been qualified by the decision of some Court of competent authority.

The case of *Middleton* v. *Losh* (2), upon which Mr. Beaumont mainly relied, does undoubtedly appear in favour of the validity of the direction to accumulate for the benefit of Marian Pinder. In that case there was a direction to accumulate the income of 50,000*l.* during the life of William Beaumont, for whose maintenance the income was, in the first place, applicable, and on his death to divide the fund with the accumulations amongst his children at twenty-one or marriage, the interests of those children being referred to as "portions," and the direction was held to be a trust for raising portions and valid on the authority of *Barrington* v. *Liddell*. (3) But

(1) 2 Keen, 564. (2) 1 Sm. & Giff. 61.
(3) 2 D. M. & G. 480.

when the reasons given by Stuart V.-C. are looked at, it seems to me that he was confused by *Barrington* v. *Liddell* (1), which was really decided on a different point, and that he failed to appreciate the particular facts of that case or sufficiently to notice the second reason given for the decision in *Eyre* v. *Marsden*. (2) True it is that the subject-matter in *Barrington* v. *Liddell* (1) was, as it was in *Middleton* v. *Losh* (3), a specific sum of money, but in *Barrington* v. *Liddell* (1) there was at the date of the will an existing charge for portions on family estates under a settlement, and by the will a sum of 15,000*l.* was directed to be set apart and accumulated during a period which exceeded that allowed by the Act, and at the expiration of that period to be applied in redeeming the charge for portions; it was there held that that was a provision for raising portions within the saving section of the Act.

Middleton v. *Losh* (3) has been much commented on. In *Burt* v. *Sturt* (4) Wood V.-C. said: "The case before Vice-Chancellor Stuart, *Middleton* v. *Losh* (3), is not at all similar to this. The case before Vice-Chancellor Stuart does, I think, seem in opposition to *Eyre* v. *Marsden*. (2) In that case there was no fund raised out of the accumulations of another fund for the purpose of making provisions for parties, and then the fund passed over, subject to the direction for accumulation; but it is the fund itself that is accumulated. So far, that case is in opposition to *Eyre* v. *Marsden* (2); because, in *Eyre* v. *Marsden* (2), Lord Langdale seems to have been of opinion, that, where the fund itself was the thing to be accumulated, that was not within the provision for raising portions out of and by means of the accumulation of a fund." And in *Morgan* v. *Morgan* (5) Knight Bruce V.-C. decided against the case being within the exception in s. 2 of the Act.

Then the decision in *Watt* v. *Wood* (6) seems to me directly opposed to that in *Middleton* v. *Losh*. (3) In *Watt* v. *Wood* (6) a testator gave a sum of money to trustees upon trust to receive the dividends during the life of his niece's husband, and to invest and accumulate such dividends for the benefit of his niece for her life; and after the death of his niece and her husband for the benefit of all his

(1) 2 D. M. & G. 480.
(2) 2 Keen, 564.
(3) 1 Sm. & Giff. 61.
(4) 10 Hare, 415, 426.
(5) 20 L. J. (Ch.) 109, 111.
(6) 2 Dr. & Sm. 56, 59, 60.

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niece's children except an eldest or only son. The money had been invested, and the dividends had been invested and accumulated for a period exceeding twenty-one years, and it was held that it was not a gift to raise portions within s. 2 of the Act, and therefore that the persons entitled under it were only entitled to the accumulations for twenty-one years from the testator's death. And Kindersley V.-C., in giving judgment in that case, said: "The accumulation of the income during Mr. Lockwood's life was directed for the purpose of forming a fund for the benefit of a parent and her younger children. How can it be said to be a provision for 'raising portions' for children? It does not come within the proper meaning of the words." Then he says: "In *Middleton* v. *Losh* (1) the Vice-Chancellor Stuart was, I think, under the impression that *Barrington* v. *Liddell* (2) laid down a principle inconsistent with the other cases on the question what sort of provision for children came within the meaning of 'portions'; but upon examination it appears to me that the point upon which Lord St. Leonards overruled the Vice-Chancellor Turner in *Barrington* v. *Liddell* (2) was this, that inasmuch as the language of the exception in the second section required that the children for whom the provision is made should be children of a person taking some interest under 'such conveyance, settlement or devise,' the Vice-Chancellor Turner was of opinion that the parent must take an interest under the very clause which gives the portions, and further that there was no gift to the parent of any money, or other direct benefit. . . . . Whereas Lord St. Leonards considered that the parent took under the will such an interest as was sufficient to bring the case within the requisitions of the second section." And as to *Barrington* v. *Liddell* (2), Kindersley V.-C. said that the question upon which the decision in that case turned was altogether different from that which arose in the case before him, and that it did not appear to him that *Barrington* v. *Liddell* (2) overruled the other cases with reference to the question which he then had to decide.

In this state of the authorities, quite independently of my own view of the matter, I should feel bound to follow the decision in *Watt* v. *Wood*. (3) And I notice that both in Jarman on Wills, 6th ed. vol. i. p. 386, and Theobald on Wills, 7th ed. p. 617, the

(1) 1 Sm. & Giff. 61. (2) 2 D. M. & G. 480.
(3) 2 Dr. & Sm. 56.

decision in *Middleton* v. *Losh* (1) is considered to be irreconcilable with the other decisions. But in principle is there any distinction between cases where the fund to be accumulated is residue and where it is a specified sum to be set aside? I can see no distinction. The Act deals with the settlement of property, whether real or personal. Where a particular legacy, pecuniary or specific, is settled by a will, it is as much covered by the Act as a settlement of a testator's residue. Here I can see no more reason for treating the settlement of this sum of 8000*l.* as not a settlement than I could if it were a settlement of the whole estate. The fund was intended to be a marriage portion for the granddaughter, but that is a different thing from a provision for "raising" a portion out of a settled fund. I therefore hold that the direction to accumulate was wholly invalid and did not come within the exception as to raising portions mentioned in s. 2 of the Act.

Solicitors for plaintiff and granddaughter: *Lowless & Co.*

Solicitors for defendant Bell: *Blundell, Baker & Co., for J. M. Moore & Armstrongs, South Shields.*

(1) 1 Sm. & Giff. 61.

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[1917 H. 1111.]

Education—Public Elementary School—Non-provided School—Dismissal of Headmaster—Contract of Service—Notice of Determination—"Grounds connected with the giving of religious instruction in the school"—Consent of Local Education Authority—Irregularity of Appointment of School Managers—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-s.* 1; *Sched. I., Part B.* 3.

In 1899 the plaintiff was appointed headmaster of a boy's school under an agreement in writing determinable by three months' written notice on either side. The school became a non-provided school under the Education Act, 1902. In 1917 the plaintiff sent an indignant, and admittedly improper, letter of protest to the diocesan inspector against an adverse report by the latter upon the result of his recent examination of the children on the subjects of religious instruction in the school. The plaintiff refused to withdraw the letter at the instance of the defendant managers, who thereupon suspended him for insubordination, and, after the local education authority had been informed of the incident and had intimated that their consent was not necessary to dismissal on grounds connected with the giving of religious instruction in the school, the defendants gave the plaintiff three months' notice in writing terminating his agreement. In the meantime the plaintiff had written to the diocesan inspector withdrawing and apologizing for his letter. Subsequently the defendants accorded the plaintiff an interview, but, nevertheless, adhered to their decision to determine the agreement:—

Held by Peterson J., following *Young* v. *Cuthbert* [1906] 1 Ch. 451, that the provisions of s. 7, sub-s. 1, of the Education Act, 1902, conferred no rights upon a teacher, but merely regulated the relations between the managers of the school and the education authority, and that therefore, even assuming that the grounds of the plaintiff's dismissal were not connected with the giving of religious instruction (an assumption which his Lordship made against the inclination of his own opinion), the plaintiff was not entitled to avail himself either of the want of consent on the part of the local education authority, or of the directions for giving a teacher an opportunity of meeting charges before dismissal contained in the regulations and instructions issued by the local education authority to school managers relative to cases coming within s. 7, sub-s. 1 (*c*).

Smith v. *Macnally* [1912] 1 Ch. 816 not followed.

Held by the Court of Appeal on the facts, that the grounds of dismissal of the teacher were solely connected with the giving of religious instruction in the school, and therefore under s. 7, sub-s. 1 (*c*), the consent of the local education authority was not

required, and that consequently it was unnecessary to decide whether s. 7 conferred any rights upon a teacher.

The number of the school managers was six. Two of the defendants had been duly appointed, one by the local education authority, the other by the parish council, while a third was, as vicar of the parish, an ex officio foundation manager. The remaining three defendants had not been elected triennially by the subscribers to the school as prescribed by an Order of the Board of Education, but had been irregularly elected either by the parishioners at a general meeting or by co-option :—

Held by Peterson J. and the Court of Appeal, that by virtue of the provisions of clause 3, Part B, of the First Schedule to the Education Act, 1902, the proceedings of the defendants were not invalidated by the defect in the election or appointment of three of their number.

Meyers v. *Hennell* [1912] 2 Ch. 256 followed.

WITNESS ACTION.

The following statement of facts is taken from the considered judgment of Peterson J.

" In this action the plaintiff, who is, or was, the headmaster of a non-provided school at Sonning, seeks to prevent his dismissal from that post by the defendants, who are, or claim to be, the managers of the school. The plaintiff alleges that the termination of his services by the defendants is bad on several grounds : First, because he was not dismissed on grounds connected with religious instruction and that the consent of the Berkshire Education Authority was a condition precedent to the right of the defendants to dismiss him ; secondly, because the defendants are not a duly constituted body of managers and therefore are not competent to dismiss him ; and, thirdly, because before dismissing him the defendants did not give him an opportunity of meeting the charges made against him.

" The main facts in this case are as follows : The plaintiff was appointed headmaster under a written agreement in 1899, and he remained headmaster until the defendants gave him notice to determine his employment last year. The agreement is in these terms. It is made between the Venerable Archdeacon Pott, the vicar of Sonning, acting on behalf of the managers of the boys' school and the plaintiff : ' It is hereby mutually agreed as follows :— (1.) The master shall teach and serve as master at the said school from the ninth day of April 1899 under the directions of the managers

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in accordance with the requirements of the Education Department. (2.) The managers shall pay to the master the sum of 90*l.* per annum by quarterly or monthly instalments and shall also allow him the free use of the house attached to the boys' school.' Then clause 3 is this: 'This agreement may be terminated by notice given in writing on either side of three calendar months' notice and in case of such notice being given on either side the master shall give up the school premises and the master's house at the end of such notice.'

"Prior to the Act of 1902 the plaintiff was paid by the managers for the time being, and since the passing of the Act he has continued to receive his remuneration from the persons who acted from time to time as managers, although the money was in fact provided by the Berkshire Education Authority and the receipts which he signed were given to the authority. The religious instruction in this school has been supplied partly by the vicar, who was one of the managers, and partly by the plaintiff. From time to time examinations have been held by the diocesan inspector with a view to testing the proficiency of the scholars in the sphere of religious education, and of late years these examinations, which were partly written and partly oral, have been conducted by Mr. Nixon or Mr. Acworth. On these occasions the school is closed for the purposes of ordinary education. In the year 1917 Mr. Nixon was unable to attend, but he supplied a set of written questions, while Mr. Acworth examined the pupils viva voce. In due course Mr. Acworth made his report in the following terms: 'The boys answered well as far as they could and appeared interested in the questioning in both classes.' The written work was corrected by the general inspector, who reports: 'Written work in this class (upper) much below the average and distinctly poor; Prayer-book question not attempted by any one. Papers of lower class quite good.'

"It will be observed that the adverse portion of this report is the judgment of Mr. Nixon, who was the general inspector, on the answers to the written questions. For some reason the plaintiff came to the conclusion that Mr. Acworth's portion of the report was unfair, and, moved by indignation at what he conceived to be the injustice with which the school had been treated by Mr. Acworth,

he proceeded to write a letter which he put before Miss Connelly, the headmistress of the girls' school, and the assistant teachers, and the letter was signed by all of them and despatched to Mr. Acworth. The letter runs thus: 'Dear Mr. Acworth,—We teachers are very disappointed and hurt over your Scripture reports. Strive as hard as we can, you never give us any praise or encouragement but instead we get such vague and ambiguous expressions as 'the school has great possibilities'—that is a quotation from the report of 1916—'the children answered as well as they were able,' and so on. As a consequence we regret to say we have lost faith in you and your methods of inspection, and instead of welcoming you to the schools as we should like, your visits and reports only upset and discourage us. We cannot help feeling that your little differences of opinion with our vicar (which are apparent to us and which we cannot help) do influence you when writing these reports. We honestly believe that you inspect and report conscientiously and to the best of your ability, but unconsciously perhaps your opinions are affected by these differences. Under these circumstances we beg to propose that some arrangement will be made whereby you will be relieved of the necessity of writing these reports, which must be as painful to you to write as they are for us to read. Failing some mutually satisfactory arrangement we teachers in justice to ourselves propose to lay the matter before the Bishop of Oxford.' Mr. Acworth was, not unnaturally, astonished to receive such a communication, and laid the correspondence before the defendants. Mr. Matthews, one of the defendants, requested the plaintiff and Miss Connelly to withdraw the letter, but this they refused to do, and reiterated the charges of unfairness and injustice on the part of Mr. Acworth, and on May 15 the defendants gave notice to the plaintiff and Miss Connelly that they suspended them for insubordinate conduct and that their conduct would be reported to the Berkshire Education Committee with a view to dismissal, and on the same day they informed the Berkshire Education Committee of the suspension and recommended that both teachers should be dismissed for insubordination. On May 16 the education secretary replied that the consent of the Berkshire Education Committee was not required for dismissals—'on grounds connected with the giving of religious instruction in the school.' On the 17th he wrote stating that his

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committee was 'precluded from discussing any part connected with diocesan inspection,' and that, technically, the school was closed on the day when the diocesan inspection took place. He emphasized this view in a further letter of May 19.

"About this time the plaintiff consulted the Reading Branch of the National Union of Teachers, and was advised by that body that his letter to Mr. Acworth was an improper letter and ought to be withdrawn. Acting on this suggestion, he and Miss Connelly on May 21 withdrew their letter and apologized to Mr. Acworth for it, and on the 22nd informed Mr. Matthews of that fact. The defendants, however, on the 22nd resolved that three months' notice be given to the plaintiff and Miss Connelly, and formal notice to that effect was given on May 23. On June 20 the plaintiff and Miss Connelly requested the defendants to allow them to attend and explain matters; and on June 25 the meeting took place, with this result, that the defendants resolved to adhere to their determination to part with the plaintiff and to withdraw the notice terminating Miss Connelly's engagement. Thereupon the plaintiff commenced this action.

"Under the Act of 1902 and the Final Order of the Board of Education, dated September 29, 1903, the managers of this non-provided school are six in number, of whom two were to be appointed by the education authorities, while of the remaining four, who are called foundation managers, one is to be the vicar of Sonning, and three, the representative managers, are to be qualified persons elected by qualified subscribers to the funds of the school at a meeting to be held every three years for that purpose. Qualified subscribers are defined to be (*a*) persons who have contributed 2*s*. 6*d*. to the school funds for each of the three preceding years; (*b*) contributors of not less than 5*l*. in one sum; and (*c*) societies or other bodies who have contributed not less than 10*l*. in one sum. If there are less than eight qualified subscribers, the right of election is to be exercised by the foundation managers—that is to say, the foundation managers have power to co-opt. In the present case there were when the first representative managers came to be elected more than eight contributors of 5*l*. to the school funds. They, however, were not convened. It appears that a public meeting was called which purported to elect three persons to be the first

representative managers. Since that date there has not been any meeting of qualified subscribers, nor has there been any triennial election at all. When there has been a vacancy by death or resignation the managers have co-opted another person to fill the vacancy. It seems, therefore, that the appointment of the representative managers in 1903 and 1904 was irregular, as it was effected by a body which was not authorized to appoint them, and consequently there is a defect in the appointment of the present representative managers; but there is no flaw in the title of the vicar and the two managers appointed by the education authority."

The action came on for hearing before Peterson J. on February 27, 1918.

Maugham, K.C., and *A. A. Thomas*, for the plaintiff. The defendants who purported to act as managers were not so in fact, some of their body being mere strangers, and they had no right to dismiss the plaintiff. The defendants rely on s. 25, sub-s. 1, of the Education Act, 1902, and on clauses 3 and 11 of Part B of the First Schedule to that Act, but those provisions only relate to a defect, e.g. an insufficiency of notice, in the appointment of the managers, not to an absolute want of appointment. They are similar to the provisions of s. 74 of the Companies (Consolidation) Act, 1908, which do not cover a case where there has been a radical want of appointment of directors: per Lindley M.R. in *Dawson* v. *African Consolidated Land and Trading Co.* (1) The words "defect in the election or appointment" in clause 3 of Part B presuppose that there has been an appointment or purported appointment, but in the present case, although there are eight subscribers still alive, there were no meetings and no appointment by them in 1907, 1910, 1913, or 1916. Clause 1 of Part B cannot apply, because we have shown that there has been a total failure to hold a proper and regular election, and that fact distinguishes this case from *Meyers* v. *Hennell.* (2) It is not enough that the majority of the defendants may have been regularly appointed, because the vote of one unqualified person is sufficient to invalidate their proceedings: *Lane* v. *Norman.* (3)

(1) [1898] 1 Ch. 6, 13. (2) [1912] 2 Ch. 256.
(3) (1891) 66 L. T. 83.

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Further, the defendants purported to dismiss the plaintiff on charges which the plaintiff had no opportunity of meeting and in flat disregard of the Berkshire Education Committee's regulations Nos. 56 and 57 of 1913, and the elementary principle of justice was neglected, which ought to bind people occupying a judicial position such as the defendants held, and which demanded that the plaintiff should be told of the charges against him and should have an opportunity of answering them: per North J. in *Fisher* v. *Jackson*. (1) There was no contract between the plaintiff and the defendants, and the latter were therefore bound by regulations 56 and 57, which they failed to observe.

Again, the consent of the Berkshire Education Committee to the dismissal of the plaintiff was required and was not obtained. This point involves the question whether the notice was based on grounds connected with the giving of religious instruction in the school within the meaning of sub-s. 1 (*c*) of s. 7 of the Education Act, 1902. (2) The ground upon which the plaintiff was dismissed was

(1) [1891] 2 Ch. 84, 94.

(2) The material provisions of s. 7, sub-s. 1, are as follows:—

"7.—(1.) The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:—

"(*a*) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds, and, if the managers fail to carry out any such direction, the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours;

"(*b*) The local education authority shall have power to inspect the school;

"(*c*) The consent of the local education authority shall be required to the appoint-

insubordination, and that relates to his conduct rather than to his capacity as a religious instructor and is not within clause (*c*). In *Young* v. *Cuthbert* (1) Buckley J. held that the provisions in clauses (*a*) to (*e*) of sub-s. 1 of s. 7 operated only as between the managers and the education authority and conferred no right on the teacher. That case was decided before the Regulations of 1913 were in force. That case was not cited in *Smith* v. *Macnally* (2), in which Warrington J. took a contrary view and held that the position acquired by a teacher under the Act conferred a statutory right to have the requirements of the Act with regard to dismissal complied with. In *Blanchard* v. *Dunlop* (3) the Court of Appeal declined to decide between the two conflicting views, but we submit that the view taken by Warrington J. was right and that, the ground of dismissal in this case being insubordination, and not being a ground connected with the giving of religious instruction, the consent of the local education authority was necessary, and that, as it was not obtained by the defendants, the dismissal was invalid.

Tomlin, K.C., and *W. R. Sheldon*, for the defendants. The position of a teacher in a non-provided school under the Act is that of servant to the managers, and the ordinary rule of a contract of service applies. There is no privity of contract between him and the local education authority. Under s. 7 of the Education Act, 1902, there is an obligation upon the local education authority to maintain a non-provided school so long as the conditions in sub-s. 1 are fulfilled. If they are not complied with the grant is withdrawn: *Crocker* v. *Plymouth Corporation* (4); *Gillow* v. *Durham County Council.* (5) In this last case *Young* v. *Cuthbert* (1) was cited, and it applies to the present case. The weight of authority is in favour of the view there taken, as against that expressed in *Smith* v. *Macnally.* (2) There may be some limitation under s. 7 to the powers of the

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ment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher unless the dismissal be on grounds connected with the giving of religious instruction in the school."

(1) [1906] 1 Ch. 451.
(2) [1912] 1 Ch. 816.
(3) [1917] 1 Ch. 165.
(4) [1906] 1 K. B. 494.
(5) [1911] 1 K. B. 222; [1911] 2 K. B. 1074; [1913] A. C. 54.

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managers, but where is there any power given in the statute to a teacher to bring an action to enforce it?

In the present case the local education authority considered that their consent to the dismissal of the plaintiff was not necessary and was not a condition precedent to such a dismissal. The plaintiff, therefore, has no right to be heard: *Blanchard* v. *Dunlop.* (1) The whole object of the Act is to secure the efficiency of the school so long as it is entitled to be maintained out of the public funds. The dismissal of the plaintiff was clearly on "grounds connected with the giving of religious instruction in the school." That appears from the facts and the correspondence. The managers being the employers of the plaintiff in law and in fact, both before and after the Act of 1902, had power to dismiss him under the terms of the contract. The defective election of the three representative managers does not matter: *Meyers* v. *Hennell.* (2) It comes under clause 3 of Part B in the First Schedule to the Act of 1902. Further, it is not open to the plaintiff to raise this question at all. It is one for the Board of Education to determine: *Blencowe* v. *Northamptonshire County Council.* (3) The dismissal has been therefore regular under the contract of service: *Pottle* v. *Sharpe.* (4) The cases referred to on the other side of *Lane* v. *Norman* (5) and *Fisher* v. *Jackson* (6) are distinguishable.

Lastly, clauses 56, 57, and 59 of the Berkshire Education Committee's regulations to managers and teachers do not affect the question at issue.

Maugham, K.C., in reply.

Cur. adv. vult.

March 12. PETERSON J. stated the facts as above set out, and continued: It is not any part of my duty in this case to consider whether the plaintiff's conduct was such as to supply good grounds to the defendants for terminating his engagement. It may be that another tribunal would have come to the conclusion that, having regard to the plaintiff's long service as headmaster and to the fact that Mr. Acworth had accepted his apology, the indiscretion

(1) [1917] 1 Ch. 165.
(2) [1912] 2 Ch. 256.
(3) [1907] 1 Ch. 504.
(4) (1896) 75 L. T. 265.
(5) 66 L. T. 83.
(6) [1891] 2 Ch. 84.

of the letter to that gentleman might properly be visited with an admonition, and that the penalty of dismissal was an unnecessary severity. But that is not for me to consider. I have only to determine whether the defendants had power to do that which they have done, and I therefore proceed to consider the grounds on which it has been contended that the notice terminating the plaintiff's engagement was invalid.

It is said that the plaintiff was not dismissed on grounds connected with the giving of religious instruction, and that consequently under s. 7 of the Education Act, 1902, the defendants could not dismiss him without the consent of the Berkshire Education Committee, and that that consent was never obtained. To me it appears to be somewhat startling that after the education committee had disclaimed any right to interfere in this case and protested that their consent was not necessary it should be open to a teacher to contend that their consent was necessary and that in its absence the defendants could not terminate his engagement; but, in my judgment, I am not driven to any such impracticable conclusion. I will assume, although the inclination of my opinion is against this view, that the grounds on which the defendants desired to terminate the plaintiff's engagement were not connected with the giving of religious instruction within s. 7, sub-s. 1 (*c*), of the Act of 1902. If, however, the section is one of which a teacher cannot avail himself, the question whether the grounds were of that character does not arise. The real question is whether, assuming that the grounds of dismissal are not connected with the giving of religious instruction, s. 7, sub-s. 1 (*c*), is a substantive affirmative enactment which prohibits managers of a non-provided school from dismissing a teacher without the consent of the education authority so that it is open to the teacher to say that the absence of the consent invalidates the dismissal.

That s. 7, sub-s. 1, is not a clear and unambiguous provision is shown by the fact that two learned judges of first instance in considering its effect have arrived at opposite conclusions. The difficulty has arisen from the form of the section. [His Lordship read s. 7, sub-s. 1 (*a*), (*b*), and (*c*) and continued:] In one of the two cases it was held that clauses (*a*) and (*e*) were mere conditions which had to be fulfilled in order that the education authority

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should be liable to maintain and keep efficient a non-provided school; that they were only limitations on that liability and only regulated the relations between the managers of such a school and the education authority, and were not positive and independent enactments which gave any rights to the teachers. This was the view of Buckley J. in *Young* v. *Cuthbert.* (1) In *Smith* v. *Macnally* (2) Warrington J., whose attention was not called to the earlier decision of Buckley J., came to an opposite conclusion and held that clauses (*a*) to (*e*) were independent enactments, and that consequently a teacher had good grounds of complaint if he was dismissed without the consent of the education authority where the grounds of dismissal were not connected with the giving of religious instruction. Having to choose between these two views, I have been convinced by the reasoning of Buckley J., and therefore I hold that the plaintiff is not entitled to invoke the aid of sub-s. 1 (*c*), or to complain that he has not been properly dismissed because the consent of the education authority has not been obtained.

The next objection was of this nature. [His Lordship referred to the facts above set out relating to the appointment of the school managers, and continued:] On these facts it was contended that there was no duly constituted body of managers, and consequently that if the power of dismissal was exercisable by the managers there was in this case no body of managers which could exercise the power.

To this argument the defendants answer that under clause 3 of Part B of the First Schedule to the Act of 1902 the proceedings of a body of managers are not invalidated by any defect in the election or appointment of any managers, and in my judgment this answer is conclusive. There is a defect in the appointment of the three representative managers, and the clause therefore protects the proceedings of the body of managers from attack on this ground.

This portion of the case is covered by the decision of Eve J. in *Meyers* v. *Hennell* (3), where it was held that this clause removes objections founded on the invalidity of the appointment of managers or want of authority in those who have appointed them. It was said that clause 11 of Part B of the First Schedule shows that it is

(1) [1906] 1 Ch. 451. (2) [1912] 1 Ch. 816.
(3) [1912] 2 Ch. 256.

open to the plaintiff to attack the appointment of managers inasmuch as it provides that, until the contrary is proved, a body of managers shall be deemed to be duly constituted and to have power to deal with the matters referred to in their minutes. But whatever may be the true effect of that clause, it cannot, in my opinion, curtail the express provision of clause 3 so as to invalidate proceedings which clause 3 declares shall not be invalidated.

Counsel for the plaintiff cited *Lane* v. *Norman* (1) in support of their contention. In that case there was a deed which provided for the management of a school and the appointment and dismissal of teachers by a committee consisting of the vicar, the curate and churchwardens, and five other named persons; if the place of any of the five persons became vacant the subscribers to the school funds were to elect a successor. The deed contained a provision that any default of election or any vacancy should prevent the other members of the committee from acting until the vacancy should be filled up. All the five named persons died and the vacancies created by their deaths were not filled up. At a meeting at which the vicar and the curate and one of the churchwardens were present it was resolved to dismiss the teachers. The resolution was held bad because no notice of the meeting had been given to the other churchwarden and because a sidesman had been present at the meeting. It was said that in this case also the persons purporting to act as representative managers were, like the sidesman in *Lane* v. *Norman* (1), complete strangers, and that their participation in the discussion and resolutions invalidated the proceedings. The distinction between the two cases appears to me to be manifest. The sidesman was a complete stranger who did not purport to attend or act as a member of the committee, and there was no clause which protected the proceedings from attack in such circumstances. In the present case the three gentlemen whose presence is said to have invalidated the proceedings acted and were present as representative managers, and the proceedings of the meeting at which they took part were protected from attack by the provision in Part B of Sched. I. of the Act of 1902. In my opinion, therefore, the plaintiff has failed to maintain his objection on this ground.

Then it was contended that the defendants could not give the

(1) 66 L. T. 83.

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plaintiff notice determining his engagement without giving him an opportunity of meeting the charge of insubordination. Apart from the provisions of the Act of 1902, it would obviously be impossible to sustain this argument, as the agreement of 1899 provided for the termination of the plaintiff's engagement by three months' notice on either side, and it would be open to either party to the agreement to determine it without giving any grounds whatever for doing so. It would be as impossible for the teacher to complain that the managers had given him a three months' notice, as it would be for the managers to assert that the teacher was wrong in giving them a similar notice without giving them an opportunity of being heard.

The case for the plaintiff was, however, put in this way. Sect. 7, sub-s. 1 (*a*), of the Act of 1902 contains a provision that the managers shall carry out any directions of the local education authority as to the secular instruction to be given and for the dismissal of any teacher on educational grounds. The Berkshire Education Committee's regulations and instructions to managers and teachers contain directions as to the termination of appointments by notice (clauses 56 and 59). Clause 56 provides that care should be taken that where charges are brought against a teacher he should be informed of them in writing and have ample opportunity of meeting them; while clause 59 provides that where the consent of the education committee is required under s. 7, sub-s. 1 (*c*), of the Act the application for such consent must be accompanied by an extract from the managers' minutes recording their intention to dismiss, together with a statement of the grounds for the dismissal and a statement that the committee's instructions have been complied with. These clauses, it was urged, render it obligatory on the managers before they determine to dismiss a teacher to give him full opportunity of meeting the charges which have been made against him. It is to be observed, however, in the first place, that they only relate to dismissal on grounds not connected with the giving of religious instruction. Assuming that the grounds of dismissal in this case were not connected with the giving of religious instruction, those directions to the managers were given under s. 7, sub-s. 1, of the Act of 1902.

Now I have already held that that sub-section merely regulates the relations between the education authority and the managers

and does not confer any rights upon the teachers, and it follows that instructions given by the education authority to the managers under that section have no wider scope than the section itself, and do not confer any new rights upon the teacher or extend further than a more specific and detailed regulation of the relations between the education authority and the managers.

In these circumstances it is unnecessary to consider whether the fact that after the notice terminating the plaintiff's engagement the defendants gave the plaintiff an opportunity of stating his case at the managers' meeting of June 25, 1917, was a sufficient compliance with the instructions of the Berkshire Education Committee.

Reliance was placed on the case of *Fisher* v. *Jackson.* (1) That was a very different case from the present. Under a deed of trust the vicars of three parishes had power to appoint a master of a school and to remove him if they found that there were certain specified grounds of complaint against him. Two of the vicars, without any meeting or appointment, and without communicating with the third vicar, proceeded to dismiss the master, and it was held that the master was entitled to an opportunity of being heard in his own defence at a properly constituted meeting of the vicars. In that case the powers of the vicars were defined by the trust deed, and it is also to be observed that the terms of the deed indicated that the vicars were to act in a quasi-judicial capacity and were not to dismiss the master unless they found that the ground of complaint had been proved.

The result is that the plaintiff's contentions have failed and the action must be dismissed with costs.

R. M.

C. A.

The plaintiff appealed. The appeal was heard on May 10, 13, 14, 15, 1918.

Maugham, K.C., A. A. Thomas, and *F. K. Archer,* for the appellant.

Tomlin, K.C., and *W. R. Sheldon,* for the respondents.

The arguments were substantially the same as those used in the Court below. The following additional cases were referred to:

(1) [1891] 2 Ch. 84.

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Mitchell v. *East Sussex County Council* (1), *Gateshead Union* v. *Durham County Council* (2), *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (3), and *Mahony* v. *East Holyford Mining Co.* (4)

SWINFEN EADY M.R. stated the facts and continued: A notice proper and sufficient in form, and sufficient with regard to the length of it, has been given; that is to say, a full three months' notice has been given by or on behalf of the managers to the plaintiff. The first question, therefore, which arises is, is that a valid notice, or was the consent of the local education authority requisite to its validity in point of law?

By the Education Act, 1902, s. 7, sub-s. 1 (*c*), it is provided: "The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school." If the notice of dismissal was given on grounds connected with the giving of religious instruction in the school, then the consent of the local education authority is not required. It will be observed that I have referred to the circumstances leading up to the giving of this notice. The school had been inspected by the diocesan inspector with the view of ascertaining what progress the children had made in religious instruction. He examined the school with regard to its efficiency on that head. The result was the angry letter which I have read. It was a letter written by one of the teachers who gave the religious instruction to the inspector who examined in that subject, and was offensive in its tone, referring to the biassed character of his report. It is quite obvious that the inspection was connected with the giving of religious instruction. The report of the inspector impeached the efficiency of the religious instruction given in the school, and the act of the plaintiff, in writing the letter of April 3 was an act interfering with the mode in which the efficiency of the religious instruction given in the school was to be ascertained.

(1) (1913) 109 L. T. 778.
(2) [1918] 1 Ch. 146.
(3) [1895] 1 Ch. 629.
(4) (1875) L. R. 7 H. L. 869.

Is it possible to say, therefore, that the grounds of the dismissal were not based upon, and the whole circumstances attending the dismissal were not solely attributable to, grounds connected with the giving of religious instruction in the school? They have nothing whatever to do with the secular instruction; they were confined solely to the question of the religious instruction; and, that being so, I am of opinion that, upon the facts ascertained in the action, the dismissal was on grounds connected with the giving of religious instruction in the school, and that the consent of the local education authority for the dismissal of the plaintiff was not, therefore, necessary.

The second question that arises in the action is this: It is said that the managers, or the gentlemen who were purporting to act as managers, were, as regards three of them, not duly qualified. Sect. 6, sub-s. 2, of the Act requires that in the case of a non-provided school, as this was, "All public elementary schools not provided by the local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers not exceeding four, appointed as provided by this Act, together with a number of managers not exceeding two, appointed—(*a*) where the local education authority are the council of a county, one by that council and one by the minor local authority." That is applicable to the present case. The local education authority, the Berkshire County Council, have appointed one representative, and the minor local authority, the parish council, have appointed another, and no question is raised with regard to the validity of the appointment of those two managers. Then with regard to the foundation managers, there being either an absence of a deed of trust or a difficulty in ascertaining what the trusts were, an Order was made by the Board of Education in September, 1903, dealing with the constitution of the foundation managers. The vicar of the parish was to be one, ex officio—he was Mr. Crawfurd; there is no question as to the validity of his position as a foundation manager. There is therefore a quorum of three managers, which is the statutory quorum, one of whom is a foundation manager, and the others represent the local authorities. There is, therefore, a quorum of three validly appointed. Then, according to the provisions of the Order of the Board of Education,

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the other three managers were to be elected triennially by the subscribers to the school. I gather that what has happened is that there has been no meeting of subscribers to the school fund; that one gentleman, Mr. Matthews, acting as manager, was elected by the parishioners at a public meeting which is not in accordance with the provisions of the Order of the Board of Education; and that the two other gentlemen acting as managers were co-opted, Mr. Rose on October 17, 1906, and Mr. Penruddock on May 15, 1917. The full circumstances with regard to their election have not been gone into, but I will assume for the present, without deciding it, that there is a defect in the appointment of those three gentlemen, but there is no difficulty with regard to the other three. I am of opinion that, the three whose election or appointment is in question having acted as managers since they purported to be appointed, the acts of the body are not invalidated by their presence at the meeting, even if they were not duly qualified to act. The First Schedule to the Education Act, 1902, Part B, provides by clause 3: "The proceedings of a body of managers shall not be invalidated by any vacancy in their number, or by any defect in the election, appointment, or qualification of any manager." It is said that there is a defect in their election or appointment, but if there is any defect in their election, that defect is not to invalidate the proceedings of the body. They have purported to act since their appointment as managers; and that being so, I am of opinion that clause 3 expressly extends to protect the acts of the body of managers. Under these circumstances I am of opinion that the point raised by the plaintiff that there is a defect in the qualification of some of the managers does not invalidate the notice given.

The result is that the notice terminating his engagement must be treated as a valid notice; the plaintiff's action fails, as decided by the learned judge below, and this appeal also fails and must be dismissed.

WARRINGTON L.J. I am of the same opinion.

The Education Act of 1902, by s. 7, sub-s. 1 (c), provides: "The consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school."

The case at one time appeared to raise the very important question of law upon which there has been a conflict of judicial opinion whether the absence of the consent of the local education authority to the dismissal of a teacher deprives the notice of dismissal of its effect as between the managers of the school and the teacher. The consent, however, is not required under the provisions of the Act if the dismissal be on grounds connected with the giving of religious instruction in the school. The first question, therefore, to be determined is one of fact, whether in this particular case the dismissal was on grounds connected with the giving of religious instruction; because, if it was, then no consent was required, and the question of law does not arise. Peterson J. in the Court below assumed the point of fact in favour of the plaintiff, and then proceeded on the question of law to hold that the absence of consent did not invalidate the notice as between the managers and the teacher; but I think that the assumption of the point of fact in favour of the plaintiff was erroneous.

The Act contemplates two forms of instruction, one of which it calls religious instruction, and the other secular instruction. The ground of dismissal in the present case was certainly not connected with the giving of secular instruction. It was certainly not connected with the general character or conduct of the plaintiff. One would expect, therefore, to find that if it was justified at all, or if there was any ground for it at all, the ground would be connected with the giving of religious instruction. The ground upon which the managers dismissed the plaintiff was stated to be insubordination, and that insubordination to consist in the writing of the letter which has been referred to by the Master of the Rolls dated April 3, 1917, addressed to Mr. Acworth, the assistant diocesan inspector. That letter suggested that the inspection and the report of Mr. Acworth, not only in the year 1917, but on previous occasions, had been, to say the least of it, influenced or coloured by some differences of opinion between himself and the vicar of the parish, and that the inspection had been conducted and the report framed in a spirit unfair to the teachers engaged in the school. It also went so far as to propose—I am using the words of the letter—"that some arrangement will be made whereby you will be relieved of the necessity of writing these reports"; in other words, that some other inspector

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should be appointed to inspect this school in the place of Mr. Acworth; and it further went on to say that, failing some mutually satisfactory arrangement, which clearly means an arrangement between the authorities and the teachers, by which I suppose is meant the diocesan authorities and the teachers, they in justice to themselves proposed to lay the matter before the Bishop of Oxford. That letter was written by one who was engaged in giving religious instruction in the school. As he himself says, his duties in particular consisted of teaching the catechism, the Old Testament, and the Acts of the Apostles.

I turn now to the questions, which I do not propose to read, set on the occasion of this particular inspection. I find the two sub-questions of the first question related to the Church catechism; sub-questions (*e*) and (*f*) of the second main question related to the Acts of the Apostles; the fourth question related, in four cases, to the Old Testament, and, in the case of three of the names included, to the Acts of the Apostles. They were, therefore, questions directed to ascertain and test the efficiency of the giving of that part of the religious instruction in particular which it was the duty of the present plaintiff to give. Clearly the inspection on the part of the diocesan inspector and his report are connected with the giving of religious instruction in the school. The first is the test by which the efficiency of the giving of that instruction is to be tried. The second is the expression of opinion of the inspector as to the efficiency of the giving of that instruction. The letter of the plaintiff is, to my mind, equally connected with the giving of religious instruction, because it seeks to impeach the validity of the test by which its efficiency is to be ascertained, and it seeks further to interfere in the application of that test by obtaining or stating that it was proposed to obtain the substitution of some other personality for that through whose medium the test had hitherto been applied. It seems to me, therefore, quite clear that the insubordination, which was the ground of dismissal in this case, was insubordination—I am only using the word as being that used by the managers—connected with the giving of religious instruction. That being so, and that being the result of the question of fact, the question of law does not arise, and I think it is undesirable to express an opinion one way or the other on that question, which is whether the absence of consent invalidates

as between the teacher and the managers the notice which the managers have given to determine the plaintiff's engagement.

With regard to the other point—that is, the constitution of the body of managers—there were three who were without question validly appointed, namely, one foundation manager, the vicar, who held that position ex officio, and two representative managers, Colonel Barker and Mr. Wright, who had been duly appointed by the county council and by the parish council, the minor authority. There were three others as to whom it is certainly questionable whether they were ever validly appointed. The quorum of managers in the present case was three. The important resolution was carried at a meeting at which there were present the three undoubted members of the body, and there were also present two members, namely, Mr. Matthews and Mr. Rose, whose position is, I say, questionable. There was, therefore, a quorum consisting of the three, and the resolution was passed unanimously, and therefore it was the resolution of the three.

The Act provides in the First Schedule, Part B, clause 3: "The proceedings of a body of managers shall not be invalidated by any vacancy in their number, or by any defect in the election, appointment, or qualification of any manager." "Manager" there must mean manager de facto or a person purporting to act as manager, because the clause assumes that there is a defect in his election, appointment, or qualification. In my opinion that clause covers the present case completely. The fact that the two doubtful managers were present on May 22 is immaterial; the proceedings are not invalidated by any defect in their appointment, and there was a sufficient number of undoubtedly qualified managers who voted in favour of the resolution.

On these grounds I think the appeal fails and must be dismissed.

DUKE L.J. I am of the same opinion.

The ground the plaintiff took for challenging the notice of dismissal which has been given him, and which might have been a good ground without regard to the construction of the statute, was that the body of managers who gave him that notice were not a properly constituted body of managers. He challenged the mode of appointment of some of them, and showed, at any rate, to a degree which

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left little question in my mind, that half of those who were present on the occasion when the notice of dismissal was given had not been appointed in conformity with the requirements of the Act of Parliament, under the Order of the Board of Education dated September, 1903, but he did not dispute that the vicar of the parish, the representative of the county council and the representative of the parish council, were managers properly appointed and competent to act as members of the body of managers. He raised a question upon some expressions in a judgment of North J. in *Lane* v. *Norman* (1) which went to this extent, namely, that the presence at a meeting of managers properly constituted of persons who were not properly appointed managers, or strangers to the proceedings, would necessarily invalidate the proceedings of those members who were properly appointed and were acting in their office. I confess I should not myself have been content to come to that conclusion without further argument than we have heard in the course of the present case. There is no necessity to arrive at a decision on that question, because, as has been pointed out by the Master of the Rolls and Warrington L.J., clause 3 of Part B of the First Schedule to the Education Act, 1902, removes all doubt as to the validity of the proceedings of this body of managers on the occasion in question. That disposes of the first and general ground.

Then the plaintiff impeached the notice that was given him upon the ground that it had not been given with the consent of the local education authority, and in fact the consent of the local education authority had not been given. It was not required if the ground upon which the dismissal was to proceed was a ground connected with the giving of religious instruction in the school. Now, was the matter which had arisen here as between the plaintiff and the assistant diocesan inspector a matter connected with the giving of religious instruction in the school? The plaintiff was one of the persons engaged in giving religious instruction. The assistant inspector was the officer duly appointed as part of the process of religious instruction in the school to ascertain whether the instruction was efficiently given, and the plaintiff, no doubt in a moment of annoyance, wrote a letter in which he very strongly impeached the fairness of the proceedings of the assistant inspector, and he

(1) 66 L. T. 83.

obtained the concurrence of the other teachers in the school in a threat that steps would be taken to procure the substitution of another inspector for the assistant inspector. We are asked to say that that was not conduct connected with the giving of religious instruction in the school. I confess I cannot say so. It seems to me impossible to say that the conduct of the plaintiff with regard to that matter was not conduct connected with the giving of religious instruction, just as it is impossible to say that the holding of the inspection was not a matter connected with the giving of religious instruction. That being so, it is impossible to say that the dismissal—or rather the giving of a notice to terminate the engagement of the plaintiff, because that is all that happened, there was no summary dismissal—was not the giving of a notice on a ground connected with the giving of religious instruction in the school. For these reasons, in my opinion, the appeal fails.

Appeal dismissed.

Solicitors: *Baker & Nairne; Rawle, Johnstone & Co., for Blandy & Blandy, Reading.*

W. I. C.

EVE J. 1918 *April* 24, 25, 26, 29, 30; *May* 1, 15.

FROST *v.* THE KING EDWARD VII. WELSH NATIONAL MEMORIAL ASSOCIATION FOR PREVENTION, TREATMENT, AND ABOLITION OF TUBERCULOSIS.

[1917 F. 713.]

Nuisance—Children's Hospital for Surgical Tuberculosis—Risk of Infection—Lease—Restrictive Covenants — Construction — Building Scheme—Conveyance of Reversion—Merger of Lease—More stringent Covenant—House not to be used otherwise than as Private Dwelling-house—Injunction—Suspension.

By a lease dated February 18, 1887, H., the tenant for life in possession of a settled estate, demised to the defendant T. a parcel of land at Newport, Monmouthshire (on which Cardigan House was built), for a term of ninety-nine years, with a covenant by the lessee not to exercise or carry on upon the demised premises any noisy, noisome, or offensive trade or business, or do or suffer to be done anything which might be hazardous, or noisome, or injurious, or offensive to the lessor or his property or any of his tenants. Other similar building leases with identical covenants were granted according to a building scheme applicable to part of the estate. By a deed dated August 2, 1889, H. and his trustees conveyed the site of Cardigan House, subject to the existing lease, to W. in fee, and she covenanted with H. to the intent that the burden of the covenant might run with the premises, that she, her heirs, and assigns, would not at any time thereafter permit the premises to be used for the purpose of any trade or business "or otherwise than as a private dwelling-house." On April 14, 1893, W. conveyed and released the site of Cardigan House to T. subject to the lease of February 18, 1887, but to the intent that the term thereby created might be thenceforth absolutely merged in the reversion, and T. covenanted to indemnify W. against the covenants in the conveyance of 1889. In January, 1915, T. offered Cardigan House to the defendant association, and it was subsequently opened as a children's hospital for surgical tuberculosis.

In an action by H. and others entitled to freehold and leasehold interests in houses in the vicinity, alleging breaches of covenants by reason of sights, noise, smells, and risk of infection to the neighbourhood, and asking for an injunction to restrain the defendants from using the house for the purpose of a hospital so as to cause a nuisance, or from using the premises "otherwise than as a private dwelling-house," or in breach of the covenants in the lease of 1887:—

Held: (1.) That the carrying on of a properly equipped and well managed establishment, such as the hospital was proved to be, was not per se a noisy, noisome, or offensive business.

(2.) That, on the evidence, and in particular upon the ground that the medical evidence was unanimous and unshaken to the effect that the hospital was not a source of danger to the neighbourhood and that there was no risk of infection, the action failed as to the alleged breaches of the covenant in the lease of 1887, and also as to the alleged nuisance at common law.

But *held* (3.) that the covenant by W. in the conveyance of 1889 could not be construed as becoming effective only when the leasehold building scheme came to an end on the determination of the leases, nor could any qualification be engrafted on the declaration of merger in the deed of 1893, and therefore from that date onwards T. must be held bound by covenant enforceable by H. and his assigns not to use Cardigan House otherwise than as a private dwelling-house.

In the result, an injunction would be granted in the terms of the covenant in the conveyance of 1889, but the operation of it would be suspended for six months.

ACTION WITH WITNESSES.

By an indenture of settlement dated March 1, 1870, made between William Herbert of the first part, the fourth plaintiff, William Reginald Herbert, of the second part, other parties of the third and fourth parts, and trustees of the fifth part, the Clytha estate at Newport, Monmouthshire, was assured and limited to the use that W. R. Herbert might receive during the joint lives of W. Herbert and W. R. Herbert the yearly rent-charge therein mentioned, and subject and charged as aforesaid, to the use of the trustees, for the term of ninety-nine years from the date of the said indenture, upon trusts for securing the rent-charge, and after the determination of the said term, and in the meantime subject thereto, to the use of W. Herbert and his assigns during his life, and after his death to the use of W. R. Herbert and his assigns during his life, with divers remainders over. In 1880 part of this Clytha estate containing forty to forty-five acres was laid out under a building scheme for residential buildings of a superior class. There was no shop on this part of the estate, nor was any business carried on except by five doctors. The Bryngwyn nursing home had also recently been opened, where a few paying patients were treated. The building leases on the estate were all in a printed form and contained identical covenants. On May 20, 1885, W. Herbert died.

By an indenture dated February 18, 1887, the plaintiff W. R. Herbert demised to the second defendant, Sir Abraham Garrod

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Thomas, a parcel of land in Clytha Park Road in the borough of Newport containing 2420 square yards for the term of ninety-nine years from December 25, 1880, and Sir A. G. Thomas, for himself, his heirs, executors, administrators, and assigns, covenanted with W. R. Herbert (amongst other things) that he would not, except with the previous consent in writing of the lessor, at any time during the term exercise or carry on, or permit to be used, exercised, or carried on, upon the demised premises any noisy, noisome or offensive trade or business, or use any part of the premises as a tavern or inn, or at any time during the term do or suffer to be done anything which might be hazardous or noisome or injurious or offensive to the lessor or his property, or to any of his tenants or undertenants.

By an indenture dated August 2, 1889, made between the trustees of the term in the settlement of March 1, 1870, of the first part, W. R. Herbert of the second part, and Harriet Anna Wilson of the third part, all that piece or parcel of land in Clytha Park Road containing 2420 square yards subject to the lease of February 18, 1887, and the reversion of the said premises was conveyed so that the said premises should thenceforth go, remain, and be to the use of the said H. A. Wilson, her heirs and assigns, for ever: and H. A. Wilson did thereby for her heirs, executors, administrators, and assigns, covenant with W. R. Herbert, his heirs and assigns, and also separately with every person who under and by virtue of the limitations and provisions contained in the indenture of settlement of March 1, 1870, should thereafter be seised of or entitled to any estate or interest in any hereditaments subject to such limitations and provisions, and their respective assigns "to the intent that the burden of the present covenants may run with the premises hereby expressed to be hereby granted and every part thereof; and that the benefit thereof may run not only with the land for the time being subject to the said limitations and provisions of the said indenture of settlement, but also with the rest of the land, in the same neighbourhood which is at present subject to the same limitations and provisions, but which may hereafter be sold and conveyed away under the powers in that behalf in the said indenture contained, in manner following (that is to say) that she, the said H. A. Wilson, her heirs and assigns, ... shall not at any time hereafter use the said premises specified in the

first schedule hereto, or any part thereof, or any messuage or dwelling-house now erected, or hereafter to be erected thereon, or permit the same to be used for the purpose of any art, trade, or business, or otherwise than as a private dwelling-house, nor do or suffer to be done any act or thing upon the said premises which may be or grow to the annoyance or damage of the said W. R. Herbert, or other the person or persons aforesaid, or of the owners or tenants of lands or houses adjoining thereto."

By an indenture dated April 14, 1893, H. A. Wilson granted and released to the defendant Sir Abraham Garrod Thomas the piece or parcel of land comprised in and demised by the lease of February 18, 1887, together with the messuage or dwelling-house with outbuildings erected thereon known as Cardigan House, "to hold the same unto and to the use of the purchaser, his heirs and assigns, subject to the hereinbefore recited indenture of lease and to the term thereby created, but to the intent that the said term may be henceforth absolutely merged in and consolidated with the reversion or inheritance in fee simple of the said premises expectant on the determination of the said term: and the purchaser doth hereby covenant with the vendor, her heirs, executors, administrators and assigns, that he, the purchaser, his heirs and assigns, will at all times hereafter duly observe and perform the covenants by the vendor, and restrictive provisions in the hereinbefore recited indenture of August 2, 1889, contained, so far as the same relate to the premises hereby assured, and will at all times keep the vendor, her heirs, executors, administrators and assigns effectually indemnified against all actions, proceedings, costs, charges, claims, and demands whatever in respect of the said covenants and restrictive provisions relating to the said hereby assured premises, or any of them."

By an indenture of November 3, 1884, W. Herbert demised to John Cross a piece or parcel of land in Clytha Park Road for the term of ninety-nine years from December 25, 1880, subject to the payment of the rent thereby reserved, and with covenants on the part of the lessee identical with those contained in the indenture of February 18, 1887.

After divers assignments and ultimately by an indenture dated February 27, 1902, the hereditaments comprised in the lease of November 3, 1884, were assigned to the plaintiff Alfred Frost for

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the residue then unexpired of the term of years granted therein subject to the covenants and conditions therein contained, together with the messuage known as Portugal House erected thereon.

By a deed of May 12, 1906, the piece of land comprised in the lease of November 3, 1884, together with Portugal House, was conveyed to the plaintiff Alfred Frost, and was subject to similar restrictive covenants as those in the conveyance of August 2, 1889.

The second plaintiff, Arthur Joseph Gould, was the leaseholder of another house on the Clytha estate subject to similar covenants as in the lease of February 18, 1887. The third plaintiff, George Ernest Gwyther, was another leaseholder who subsequently purchased the freehold reversion of the premises demised to him and entered into similar restrictive covenants to those contained in the conveyance of August 2, 1889. The plaintiffs alleged that these three plaintiffs bought their respective properties as residences with knowledge of the restrictive covenants usual in leases of the Clytha estate, and in the belief that they would be strictly enforced.

On January 21, 1915, the defendant Sir A. G. Thomas by letter offered Cardigan House to the council of the defendant association for the purposes of a hospital for tuberculosis, and it was opened on June 25, 1917, as a hospital for children suffering from surgical tuberculosis only.

The writ in the action was issued on July 16, 1917. In paragraph 25 of the statement of claim it was alleged that Cardigan House was situated in a hollow and every detail of the dressing of the patients was visible to inhabitants of neighbouring houses and to those who walked down Oakfield Road; that the children were continually crying; and there was a noticeable smell of disinfectants. Further, that tuberculosis was an endemic and infectious disease, and the hospital was a source of danger to the neighbourhood, and caused a nuisance to the plaintiffs as owners and occupiers of houses at Newport, and was being used otherwise than as a private dwelling-house. In paragraph 26 it was further alleged that the use of the premises as a hospital for tuberculosis was exercising or carrying on a noisome trade or business, and was doing what was hazardous, or noisome or injurious or offensive to the plaintiff W. R. Herbert or his property, and to his tenants or undertenants,

The plaintiffs claimed (1.) An injunction to restrain the defendants from using Cardigan House as a hospital for tuberculosis so as to cause a nuisance to the plaintiffs as owners and occupiers respectively of dwelling-houses at Newport, or using the said premises for any art, trade or business, or otherwise than as a private dwelling-house, and from doing or suffering any act upon the premises which might be or grow to the annoyance or damage to the owners or tenants of lands adjoining thereto in breach of the covenants contained in the indenture of August 2, 1889. (2.) An injunction restraining the defendants from using or exercising or carrying on upon the said premises a hospital for tuberculosis or any other noisome or offensive trade or business, and from doing or suffering to be done anything which might be hazardous, or noisome or injurious or offensive to the plaintiff W. R. Herbert or his property or to his tenants or undertenants.

The defendants by paragraph 5 of their defence did not admit that the effect of the indenture of April 14, 1893, was to merge the term created by the defendants' lease in the reversion so as to make the defendant Sir A. G. Thomas immediately, or at any time during the period of ninety-nine years for which the lease was granted, liable to perform the covenants by his vendor, or the restrictive conditions contained in the indenture of August 2, 1889, and alleged that he was under no liability during that period. They further pleaded that the leases under which the plaintiffs Frost, Gould, and Gwyther held their respective premises were all granted in accordance with the building scheme, and that the plaintiffs were not entitled during the period of ninety-nine years to enforce against the defendants any restrictive covenants other than those contained in the defendants' lease. They did not admit the allegations contained in paragraphs 25 and 26 of the claim as to nuisance and breach of restrictive covenants, and in particular denied that the hospital was a source of danger to the neighbourhood.

Evidence was given on both sides as to the sights, noise, and smells connected with the carrying on of the hospital. For the defendants a number of medical experts of high standing were called, including amongst them Major T. Morrell Thomas, R.A.M.C.; Major P. Horton-Smith Hartley, R.A.M.C., C.V.O., senior physician of the Brompton Hospital for Consumption; Sir Arthur Newsholme,

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K.C.B., medical officer to the Local Government Board; and Dr. Arthur Carveth Johnson. The result of the evidence and the other facts relating to the hospital sufficiently appear from the judgment of the Court.

Clayton, K.C., and *G. B. Hamilton*, for the plaintiffs. By reason of the merger the covenants in the ninety-nine years' lease as between covenantor and covenantee are gone, and the more stringent covenant in the conveyance of August 2, 1889, not to use the premises "otherwise than as a private dwelling-house" comes into operation. As there was a building scheme on this estate the covenants in the long leases for ninety-nine years enure for the benefit of other persons. In the conveyance of the freehold to Miss Wilson there was an express declaration of merger which is binding at law and in equity.

[EVE J. It may be that the two sets of covenants coexist.]

Our contention is that on the evidence of the sights, noise, smells, and fear of infection there has been a breach of both branches of the covenant in the lease of February 18, 1887. The carrying on of the hospital is "a business" within the first branch of the covenant, even although no payment is required of the patients: *German* v. *Chapman* (1); *Bramwell* v. *Lacy* (2); *Rolls* v. *Miller* (3); *Tod-Heatly* v. *Benham.* (4) It is also doing something "noisome, injurious and offensive" within the second branch of the covenant. Our main complaint is the fear of infection; the proximity of the hospital has an injurious effect upon the value of the property in the neighbourhood, res ipsa loquitur: *Attorney-General* v. *Manchester Corporation.* (5) On the three grounds, therefore, of (1.) a breach of the covenant in the conveyance of the freehold, (2.) a breach of the covenant in the lease of 1887, and (3.) a nuisance at common law, we are entitled to the injunction claimed.

Maugham, K.C., and *W. R. Sheldon*, for the defendants. Tuberculosis is admittedly an infectious disease, but with regard to the risk of infection to the neighbourhood the evidence of the medical experts is overwhelming; they were unanimous that there was

(1) (1877) 7 Ch. D. 271.
(2) (1879) 10 Ch. D. 691.
(3) (1884) 27 Ch. D. 71.
(4) (1888) 40 Ch. D. 80.
(5) [1893] 2 Ch. 87.

no risk of infection to dwellers in the neighbourhood of the hospital. No injury in value to houses has been established; in fact, houses have increased in value there. The other complaints as to sights, noise, and smells are exaggerated and do not amount to anything like a nuisance at common law, or to a breach of the covenant in the lease for ninety-nine years. As to the covenant in the conveyance of 1889 the burden runs when the property becomes an interest in possession, that is, after the determination of the lease for ninety-nine years. The building scheme formed the local law while it was in force, and the more stringent covenant in the conveyance of the reversion not to use the house otherwise than as a private dwelling-house does not come into force while the lease is in existence. We contend that no dealing between the landlord and the tenant can affect the covenants in the lease; they are still in force. Further, there was no true merger of the term as the building scheme still existed, and the covenants in the lease could be enforced by other tenants on the estate. It is only merger sub modo. The covenant in the conveyance to Sir G. Thomas of April 14, 1893, was a covenant of indemnity only to protect the vendor against breaches of covenant and the restrictive provisions: *Harris* v. *Boots, Cash Chemists (Southern), Ld.* (1); *Whiteley* v. *Delaney.* (2) The true intention of the parties must be carried out; it was never intended to increase the restrictions on the property by the merger: *Rogers* v. *Hosegood* (3); *Renals* v. *Cowlishaw.* (4) All the parties here got what they contracted for and no more. The benefit of the more stringent covenant, therefore, only runs with the land when the leases come to an end: *Reid* v. *Bickerstaff.* (5) The plaintiff Herbert has no real interest in the matter now, and nominal damages would satisfy him if a breach of covenant is held to have been established. As to the other plaintiffs, a money payment is also the suitable remedy, and not an injunction: *Shelfer* v. *City of London Electric Lighting Co.* (6)

Clayton, K.C., in reply. The present slight interest of W. R. Herbert in the property is no bar to his bringing an action: *Goodson*

(1) [1904] 2 Ch. 376.
(2) [1914] A. C. 132.
(3) [1900] 2 Ch. 388.
(4) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.
(5) [1909] 2 Ch. 305.
(6) [1895] 1 Ch. 287.

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v. *Richardson* (1); *Krehl* v. *Burrell.* (2) Damages are not given in lieu of an injunction in cases of a deliberate breach of a restrictive covenant.

Cur. adv. vult.

May 15. EVE J. On June 25, 1917, Cardigan House, situate on the Clytha estate, Newport, Monmouthshire, was opened as a hospital for the admission of children suffering from tubercular disease requiring surgical treatment. On the 16th of the next month the writ in this action was issued claiming an injunction to restrain the defendants from using the house or permitting the same to be used for the purpose of a hospital for tuberculosis or otherwise than as a private dwelling-house, and from doing or suffering to be done any act or thing upon the said premises which might be or grow to the annoyance or damage of the plaintiffs or other owners or tenants of lands or houses adjoining thereto. The writ was amended in August and reamended in November by the addition of parties and by raising in more precise terms the relief claimed at the hearing. Of the four plaintiffs Messrs. Frost and Gwyther are owners, and Mr. Gould is tenant under a long lease, of houses in the immediate vicinity of Cardigan House. The aims of the first defendants are sufficiently disclosed by their title. The second defendant is the owner of Cardigan House, who early in 1915 generously offered it as a gift to the association "in the hope that they might be able to utilize it for the purpose of receiving children needing surgical treatment." No conveyance of the property to the association has yet been executed. Upon the proposal becoming known strong opposition to its being given effect to was raised by some of the neighbouring owners and residents, amongst whom were the plaintiffs, who, in common with most of the witnesses they called at the trial, took a more or less active part in trying to get the proposal abandoned on the ground that the institution would be a source of danger and a nuisance to the neighbourhood. These efforts failed, and the institution was opened.

The part of the Clytha estate to which the action relates is subject to a building scheme; it was laid out for residential buildings of a superior class adapted for occupation by persons of substantial

(1) (1874) L. R. 9 Ch. 221. (2) (1879) 11 Ch. D. 146.

means, and the then tenant for life in possession, the plaintiff William Reginald Herbert, developed it by means of building leases for terms of ninety-nine years, each containing identical covenants for the maintenance of the character of the estate. Amongst the covenants in the lease of Cardigan House granted to the defendant Sir Abraham Garrod Thomas on February 18, 1887, is a covenant not to use, exercise, or carry on, or permit to be used, exercised, or carried on, upon the demised premises any noisy, noisome, or offensive trade or business, or do or suffer to be done anything which may be noisome or injurious or offensive to the lessor or his property, or to any of his tenants or undertenants. The plaintiffs allege that the present user of the house is a breach of both branches of this covenant, or if not of both branches, then at least of the second branch. They also allege that, apart from covenant, the carrying on of the hospital constitutes an actionable nuisance, but concede that if they have to fall back upon this alternative cause of action the relief to which they are entitled may be restricted to an injunction to restrain the carrying on of the hospital so as to occasion a nuisance, relief which would fall short of that which they are admittedly seeking, namely, the removal of the hospital altogether.

The hospital is used only for the treatment of surgical tubercular disease, that is, the surgical treatment of tubercular joints and glands in children up to the age of twelve. It is arranged to accommodate thirty-one patients, is exceedingly well equipped and staffed, and enjoys the gratuitous services of the most eminent local surgeons. No cases of chest or pulmonary tuberculosis are admitted; the institution is a surgical hospital, not a sanatorium, and the patients are sent away to different sanatoria belonging to the association as soon as they can be moved from the hospital. Some cases are satisfactorily treated and overcome in a few weeks, in others tubercular joints have to be splintered in wood, iron, or plaster, and put into a position of rest for more or less lengthened periods, and in others again glands have to be removed and abscesses and other distressing accompaniments of the disease to be reduced by cutting, scraping, or other less drastic means. Rather less than half the operations involve a wound. The evidence is overwhelming that all this treatment is carried out with skill and care and under the most approved modern conditions, with a minimum of pain to

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the patients, with a remarkably small consumption of almost inodorous disinfectants (samples of all were produced at the trial), and with suitable receptacles for the removal of soiled dressings and bandages which are forthwith burned. When the weather is suitable the patients are carried out into the garden and there laid out on mattresses or couches to get the benefit of the air and sunshine. The house and the garden are to a certain extent overlooked by some of the surrounding houses, and from these and their gardens the nurses, and sometimes the patients passing to and fro in Cardigan House and the children lying outside in the garden, can be seen.

The first question is, Does this user of Cardigan House amount to the exercise therein of a noisy, noisome or offensive trade or business? I do not think it does. To hold that the carrying on of such an institution must involve a breach of that part of the covenant would, I think, be enlarging the operation of such a covenant beyond reasonable limits. There may be persons to whom the proximity of pain and suffering and the obtrusion before their eyes of its victims may be annoying and even distressing, but I cannot bring myself to hold that a properly equipped and carefully managed establishment for the relief of such pain and suffering is per se a noisy, noisome, or offensive business.

The second breach of the covenant on which the plaintiffs rely is of a more far-reaching operation; it extends to everything which can be noisome, or injurious, or offensive, even though the business is not per se a noisy, noisome, or offensive one within the first branch of the covenant; and I now have to consider whether the plaintiffs have established the allegations on which they rely as disclosing breaches of this part of the covenant. Such allegations are to be found in paragraph 25 of the statement of claim. They were supplemented at the trial by some evidence of an occasional discharge of smoke from one of the chimneys of Cardigan House charged with an unpleasant smell attributed to the burning of swabs, bandages, and dressings. The alleged grounds of complaint fall under four heads, that is to say, sights, noise, smells, and risk of infection, and with these I will deal separately.

The house and garden, as I have already said, are overlooked. This is a drawback, but it does not render them unsuitable for the

particular use to which they are being put. For the treatment of pulmonary consumption and for the convalescence of surgically treated tubercular patients a high altitude and abundance of sun and fresh air are desiderata, but when surgical treatment has to be resorted to it is necessary to have the operating institution within easy reach of those who generously give their skilled services to the inmates, if satisfactory results are to follow. It has been proved that neighbours, especially if they happen to be passing along the roads on which the hospital abuts, see the children being brought to and sometimes carried into the hospital, that from some points in the gardens of adjoining houses the patients can be seen lying in the hospital garden, and that, as I have already noticed, nurses and occasionally patients (the latter with surgical bandages on heads and necks) can be seen from some parts of neighbouring houses and gardens moving about in Cardigan House, looking out of the windows, and sometimes near the gate in the front of the house, but no evidence has proved that "every detail of the dressing of the patients is visible to inhabitants of neighbouring houses and all who walk down Oakfield Road," or anything like it. [His Lordship then dealt with the evidence as to noise which had been much exaggerated, and as to smells which really came to nothing, and continued :]

I have now dealt with three of the grounds on which the carrying on of the hospital is said to be noisome or offensive to the plaintiffs and other owners and tenants. In disposing of these points I have, generally speaking, stated what I hold to be the result of the evidence on both sides, but in listening to the various witnesses it was impossible not to appreciate that many of those who supported the plaintiffs' case regarded the facts to which they were deposing as a sort of vindication of the opinions they had from time to time expressed during the two years immediately preceding the opening of the hospital. Long before this event they had quite made up their minds that certain injurious and offensive results would at once follow, and when after the event incidents occurred which may have been annoying and distasteful to them, what more natural than that they should associate all such incidents with the hospital andmagnify them into noisome, injurious, and offensive occurrences ? No one impugns their good faith ; it is the competency of such

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witnesses to shake themselves free of preconceived prejudices which is questioned.

I pass now to the real and substantial objection which is summed up in the allegation "tuberculosis is an endemic and infectious disease and the hospital is a source of danger to the neighbourhood." The first part of that allegation is not disputed, though the defendants have proved that the risk of infection from pulmonary tuberculosis is very much greater than from surgical cases (according to the evidence of Dr. P. Horton-Smith Hartley), and that surgical tuberculosis is not generally derived from another person, but from an animal, as, for example, from drinking infected cow's milk (according to the evidence of Sir Arthur Newsholme). The second part of the allegation raises an issue of fact, and on this the evidence I have heard, and on which alone I have to decide the issue, is all one way. I have heard the testimony of a succession of eminent physicians, all of great experience on the subject of tuberculosis, and some of whom have been in charge of the largest and most important hospitals and institutions for its treatment, and their opinion is unanimous and unshaken that this hospital is not a source of danger to the neighbourhood and that there is no risk of infection from it to those living in its immediate vicinity. It would be impossible in the face of this unanimity for any Court to hold that the plaintiffs have established the second part of their allegation, or that there is any longer any reasonable ground for the fear of infection which they and several of their supporters have entertained. I am quite satisfied on the evidence that such fears are wholly groundless.

It comes, therefore, to this, that the hospital is no source of danger to the neighbourhood and that there is nothing in the way in which it is conducted which can properly be said to be noisome or offensive. No evidence was called by the plaintiffs to prove that it is injurious; they asked me to infer that its advent must have depreciated the surrounding property and expressed the opinion—unsupported by any data—that it had in fact depreciated the value of their own houses. The defendants, on the other hand, called Mr. Thomas Parry, an auctioneer and estate agent with forty-four years' experience in business at Newport, and he gave evidence that in his opinion the value of the property in the vicinity has

not been affected by the opening of the hospital. In this state of the evidence I can but hold that the plaintiffs have failed to establish that it has been injurious.

The conclusions at which I have arrived in considering the matters relied upon as constituting breaches of the second branch of the covenant in the lease dispose of any case which might otherwise have been raised on the allegation that the business of the hospital has been so conducted as to occasion a nuisance to the neighbourhood by noise, smell, or unsightly publicity.

So far, therefore, as the action is based on alleged breaches of the covenant contained in the lease of February 18, 1887, or on common law nuisance, I hold that it fails.

The plaintiffs, however, have raised another and more difficult case. After the building estate had been developed in the manner I have already indicated, the plaintiff William Reginald Herbert was minded to dispose of his freehold reversion, and on August 2, 1889, he and his trustees conveyed to Miss Harriet Anna Wilson (inter alia) the site of Cardigan House subject to the subsisting lease to the defendant Thomas. [His Lordship then read the covenant by Miss Wilson with William Reginald Herbert in that deed as set out in the statement of facts.] On April 14, 1893, Miss Wilson conveyed and released the site of Cardigan House and the house and outbuildings to the defendant Thomas subject to the lease of February 18, 1887, and the term thereby created, but to the intent that the said term might be thenceforth absolutely merged in and consolidated with the reversion or inheritance in fee simple of the premises expectant on the determination of the said term. And Sir Abraham covenanted to indemnify the vendor against the covenants and restrictions contained in the conveyance of 1889.

In these circumstances the plaintiffs, two of whom are owners in fee simple by virtue of conveyances containing similar restrictive covenants to those in the conveyance of 1889 and executed subsequent thereto, allege that Cardigan House is now subjected to the more stringent restrictions imposed by the conveyance of 1889, and that the defendants can no longer successfully assert that its user is regulated by the less burdensome covenants contained in the lease of February, 1887.

In answer to this the defendants urge that the premises assured

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by the deed of August 2, 1889, were the reversions expectant on the determination of the several leasehold terms therein mentioned that by these leases a building scheme establishing a local code for the duration of the terms had been set on foot, and that in the light of this knowledge Miss Wilson's covenants ought to be construed as becoming effective only when the building scheme and the code regulating it comes to an end on the determination of the terms by effluxion of time.

Further, it is argued that, even if this is not so, the merger brought about by the conveyance and release of 1893 ought not to be construed as operating to increase the restrictions theretofore imposed on the lessee.

I do not see my way to accede to these arguments. It may well be that no arrangement between the reversioner and a leaseholder could have released the latter as against third parties from any restrictions constituting part of the code regulating the user of the land subject to the building scheme, but it does not by any means follow that the lessee could not submit his property to a more stringent code as between himself and the reversioner, and persons claiming as freeholders under him. I think the construction of the conveyance to Miss Wilson—in which, be it observed, are contained covenants obviously intended to come into immediate operation, framed in language identically the same, mutatis mutandis, as the one under consideration—is too clear to be controlled by inferences as to what must have been the intention of the parties founded on the existence of what I may perhaps call the leasehold building scheme, and, as regards the qualified effect which it is suggested ought to be given to the merger, the correspondence leading up to the execution of the deed of 1893 demonstrates that the matter of the restrictive covenants to which Sir Abraham was about to be subjected was present to the mind of his advisers.

I cannot, therefore, hold that any qualification can properly be engrafted on the declaration of merger in this deed.

It follows, therefore, that from 1893 onwards Sir Garrod Thomas was, in my opinion, bound by covenant enforceable by the plaintiff Herbert and his assigns not to use Cardigan House otherwise than as a private dwelling-house. The present user admittedly involves a breach of this covenant, and I propose to grant an injunction in

the terms of the covenant down to the words "private dwelling-house." Such an injunction will, I think, give the plaintiffs all the relief to which they have proved themselves to be entitled.

Evidence has been given from which it appears that in the present condition of general hospitals, taxed as they are to their utmost capacity, the closing of this hospital would involve the return of the patients to their homes, not infrequently to surroundings calculated to aggravate their sufferings and effectually to eradicate any chance of a cure. I am satisfied that no one of the plaintiffs would willingly precipitate so great a catastrophe, and I therefore propose to suspend the operation of the injunction for six months from to-day, and to give the defendants liberty to apply for a further suspension should the present conditions continue to prevail at the end of the six months.

The plaintiffs will have the general costs of the action, but, as they have failed so far as the action claims relief for breaches of the covenant in the lease, I cannot give them these costs. I do not, however, order them to pay any costs, as, although I cannot help thinking they were somewhat hasty in launching the action when the hospital had only been open three weeks and when it could hardly have got into working order, I think, perhaps, the apprehension of infection was not altogether unreasonable. Accordingly, the order for costs will be an order for payment by the defendants of the costs of the action, except in so far as they have been increased by the claim for an injunction based on the alleged breaches of the covenant contained in the lease of February 18, 1887. There will be no order as to such increased costs.

Solicitors: *Gamlen, Bowerman & Forward, for Hunter & White, Newport, Monmouthshire; Ellis Davies, Roberts & Co., for D. W. Evans, Cardiff.*

G. M.

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In re BURNHAM.
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[1917 B. 2432.]

Will—Construction—Meaning of "Issue"—Effect of Context.

In construing a will the word "issue" has the normal prima facie meaning of descendants of all generations.

Consideration of the context which will displace or support this prima facie construction so as to limit the operation of the word to children.

A testator gave property to trustees, upon trust to pay the income thereof to his widow for her life, and after her death to his daughter for life, and, after the daughter's death, to hold the property in trust for her "issue" as she should appoint, and, in default of appointment, in trust for her "children." The hotchpot clause and other provisions of the will also made a clear distinction between the "children" and the "issue" of the daughter, and the will provided that if there should be no child of the daughter who should become entitled to a vested interest, then, from and after her decease and such default or failure of children, the property should be held "In trust for such of the class of persons following, namely, any brothers and sisters living at the death of the survivor of my said wife and daughter, and the issue then living of my brothers and sisters dying in the lifetime of the survivor of my said wife and daughter, as shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parents." The residue was given "Upon trust for such of the class of persons following, namely, my brothers and sisters and the brothers and sisters of my said wife living at the death of the survivor of my said wife and daughter, and the issue then living of my said brothers and sisters and the brothers and sisters of my said wife dying in the lifetime of my said wife and daughter, who shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parents." The widow and daughter survived the testator, and the daughter survived the widow without having been married:—

Held, on the construction of these two trusts, (1.) that if there had been no previous context to the contrary, the effect of the provision that issue were to represent their deceased "parents" would probably have been such a context as to confine "issue" to children; but (2.) that, having regard to the very careful distinction between "children" and issue in the earlier parts of the will, the word "issue" in the two later gifts included grandchildren as well as children; (3.) that nephews and nieces of the widow

whose parents died before the date of the will were entitled to share ; and (4.) that persons descended both from a collateral of the testator and a collateral of his widow would together take the two shares which their two deceased parents would have taken.

WILLIAM CRICE BURNHAM, by his will, dated July 20, 1869, gave and devised all his undivided moiety of certain specific hereditaments, and all other his real and personal estate, including a sum of 200*l.* bequeathed to him by his late uncle William Burnham, unto and to the use of his trustees, upon trust to sell and convert the same, and to invest the proceeds thereof, and to pay the whole of the income arising from the principal trust funds to his wife, Hannah, during her life, and, from and after her decease, to pay the income to his daughter Ann Johnson during her life, and, from and after her decease, then, as to the whole of the principal trust fund and premises, the testator directed that the same should be upon trust for the "issue" of the said daughter as she should by deed or will appoint, and, in default of appointment, in trust for all her "children" as therein mentioned. Then followed a proviso that no child of his said daughter who or whose issue should take any part of the trust funds under an appointment should, in default of appointment to the contrary, be entitled to any share in any part of the unappointed trust funds without bringing into hotchpot the share appointed to him or her or his or her issue, and a power to advance any child of his said daughter.

It was then declared that, if there should be no child of his said daughter who should become entitled to a vested interest, then, from and after her decease and such default or failure of children, the principal trust funds and premises and the income thereof, or so much thereof respectively as should not have become vested or been applied under any of the trusts aforesaid, should be held upon the trusts following, that was to say: As to so much of the principal trust funds as should have been produced by the sale of his real estate and should arise from the said legacy of 200*l.* "In trust for such of the class of persons following, namely, my brothers and sisters living at the death of the survivor of my said wife and daughter, and the issue then living of my brothers and sisters dying in the lifetime of the survivor of my said wife and daughter, as shall attain the age of twenty-one years, distributively, yet so that the

SARGANT J. issue shall participate only as representing their deceased parents; and as to so much of the said trust funds as shall be produced of the residue of my estate, the same shall be held upon trust for such of the class of persons following, namely, my brothers and sisters, and the brothers and sisters of my said wife, living at the death of the survivor of my said wife and daughter, and the issue then living of my said brothers and sisters and the brothers and sisters of my said wife dying in the lifetime of the survivor of my said wife and daughter, who shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parent."

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The testator died on November 24, 1872, leaving his wife and his said daughter Ann Johnson him surviving.

The testator's widow died on October 12, 1897, and his daughter died on September 22, 1917, without ever having been married.

The testator had one brother, namely, John Burnham, and two sisters, namely, Mary Ann Hogram and Merca Burnham, all of whom died in the lifetime of Ann Johnson. John Burnham had eight children, all of whom, except the defendant Mary Carrick, died in the lifetime of Ann Johnson, and some of whom left children who were still living. Mary Ann Hogram had four children, all of whom, except the defendant Ann Trowhill, died in the lifetime of Ann Johnson, and some of whom left children who were still living. Merca Burnham, who married William Rodwell, had seven children, of whom four died in the lifetime of Ann Johnson, and some of whom left children who were still living, the defendant George Rodwell being one of the grandchildren of Merca Rodwell. Of the three surviving children of Merca Rodwell one was the defendant Frank Burnham Rodwell.

The testator's wife, Hannah Burnham, had five brothers, namely, the said William Rodwell, John Rodwell, Thomas Rodwell, Peter Rodwell, and Abraham Rodwell, and one sister, namely, Nancy Rodwell, all of whom died in the lifetime of Ann Johnson, and two of whom, namely, William Rodwell and Peter Rodwell, died before the date of the testator's will. John Rodwell had eight children, four of whom died in the lifetime of Ann Johnson, and some of whom left children who were still living. Thomas Rodwell had five children, all of whom died in the lifetime of Ann Johnson, and

some of whom left children who were still living. Peter Rodwell had nine children, five of whom died in the lifetime of Ann Johnson, and some of whom left children who were still living. Of his four surviving children one was the defendant Arthur Rodwell. Abraham Rodwell had four children, all of whom died in the lifetime of Ann Johnson, and some of whom left children who were still living. Nancy Rodwell died without ever having been married.

The trustees of the will took out an originating summons raising the question whether in the two gifts to brothers and sisters of the testator, or brothers and sisters of his widow, and their issue respectively, the word "issue" was confined to children, and the questions were also argued whether the descendants of a brother or sister who had died before the date of the will were included, and what shares were taken by persons who were descended both from a collateral of the testator and a collateral of his widow.

The case was argued on March 5, 1918.

G. R. Northcote, for the trustees of the will, stated the facts and the questions involved.

Horace Freeman, for the defendants Mary Carrick, Ann Trowhill, and Frank Burnham Rodwell. The persons who take under either gift are only the children of the deceased brothers and sisters of the testator and his wife. The "issue" who are to participate as representing their deceased parents must, upon the construction of this will, be restricted to children in the case of both gifts. "Issue" will, no doubt, prima facie include descendants, but the context of a will as a whole must be regarded in deciding whether "issue" is to have the narrower meaning of children. Here the substituted gift is to issue of brothers and sisters deceased, and the issue are to participate only as representing their deceased "parents," a context which clearly indicates that children only are to take: *Sibley* v. *Perry* (1); *Pruen* v. *Osborne* (2); *Smith* v. *Horsfall.* (3) *In re Embury* (4) was a case where there were indications in the will that "issue" meant children. In *In re Timson* (5) "issue" was confined

(1) (1802) 7 Ves. 522.
(2) (1840) 11 Sim. 132.
(3) (1858) 25 Beav. 628.
(4) (1913) 109 L. T. 511.
(5) [1916] 2 Ch. 362.

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to children. There the implication raised by the rule in *Sibley* v. *Perry* (1), that issue may have to be limited to children, was rebutted by the context of the will, and "issue" had its literal and prima facie meaning restored. In *Ross* v. *Ross* (2) "issue," in reference to the word "parent" in a substitutional gift, was held not to be limited to children. But there the gift over on the death of the tenant for life was to her children living at her decease and the issue of such of her children as might have died. The surviving children of the marriage of William Rodwell and Merca Burnham are entitled to double shares under the gift of the residue, namely, the share which their deceased mother would have taken and also the share which their deceased father would have taken, or, in other words, as being descendants of Merca Rodwell and also of William Rodwell.

Arnold Jolly, for the defendant George Rodwell. There are sufficient indications in this will to give the word "issue" its wider signification of descendants, so as to include the grandchildren of the testator's brothers and sisters. But for the more adjacent context, the direction that issue are to participate only as representing their deceased "parents" might, according to the authorities, be sufficient to limit the word "issue" to children, but the still earlier context in the will, where a careful distinction is drawn between "children" and "issue," is sufficient to restore to the word "issue" its wider and prima facie meaning.

Cecil W. Turner, for the defendant Arthur Rodwell. Arthur Rodwell is entitled to a share notwithstanding that his father, Peter Rodwell, was dead at the date of the testator's will. There is a substantive gift to the children of parents dying in the lifetime of the survivor of Hannah Burnham and Ann Johnson. It is not necessary to show that the testator contemplated Peter Rodwell as being capable of taking as one of a class. [He referred to *Tytherleigh* v. *Harbin* (3), *Bebb* v. *Beckwith* (4), *Coulthurst* v. *Carter* (5), *In re Faulding's Trust* (6), *In re Thompson's Trusts* (7), and *Heasman* v. *Pearse*. (8)]

(1) 7 Ves. 522.
(2) (1855) 20 Beav. 645.
(3) (1835) 6 Sim. 329.
(4) (1839) 2 Beav. 308.
(5) (1852) 15 Beav. 421.
(6) (1858) 26 Beav. 263.
(7) (1854) 5 D. M. & G. 280.
(8) (1871) L. R. 7 Ch. 275.

The children of William Rodwell and Merca Rodwell are entitled to only one share of the property in the second gift to the brothers and sisters of the testator and his wife. See the first point decided in *Pruen* v. *Osborne*. (1)

Cur. adv. vult.

March 27. SARGANT J. The first question here, and the first part of the second question, are concerned with the familiar difficulty whether, in a gift to certain persons and their issue, the term " issue " is to have its normal prima facie meaning of descendants of all generations, or is to be limited, on the context of the particular document, to children. The context said to be sufficient in this case is the same kind of context which was held to be sufficient in the case of *Pruen* v. *Osborne* (1), where the words of gift were very similar to those here, and which was also held to be sufficient when coupled with other assisting context in the still better known case of *Sibley* v. *Perry*. (2) But to say this is not to determine the question, or even to make a start in determining it, but merely to indicate one of the factors to be taken into account in solving the problem. The problem has to be solved de novo, and on a just interpretation of the whole of the language of this particular will. It will not do to start with a presumption that the case is governed by *Pruen* v. *Osborne* (1) because it may have some marked features in common with it, and then to inquire whether there is other context sufficient to displace or override this presumption: see per Romer L.J. in *In re Gorringe* (3) and per Lord Cozens-Hardy M.R. in *In re Timson*. (4)

One must, however, undoubtedly start with this, namely, that as a matter of legal construction the word " issue " has the prima facie meaning I have mentioned. And indeed, notwithstanding the expression of so high an authority as James L.J. in *Ralph* v. *Carrick* (5), I am by no means certain that the legal meaning differs in this respect from the popular meaning of the term so far as it is popularly used at all. It is quite true that a layman, if asked what issue a man has, might probably reply by stating the

(1) 11 Sim. 132.
(2) 7 Ves. 522.
(3) [1906] 2 Ch. 341, 347-8.
(4) [1916] 2 Ch. 362, 365.
(5) (1879) 11 Ch. D. 873, 884.

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man's children, and neglecting any grandchildren or remoter descendants. But a slightly inaccurate statement of the kind is also often made in petitions and other legal documents when it is said, and said almost as a matter of course, that there was issue of a marriage a certain number of children, and no more. In each case the explanation obviously is that attention is concentrated on the more immediate issue, and the remoter issue are neglected. If, however, the facts are stated, not positively but negatively—which seems to me the surer test—I think that ordinary usage as well as legal usage is exactly the reverse. In the case of a family man whose children had all died in his lifetime, but who had grandchildren who survived him, I do not think that any one, whether a lawyer or a layman, who had the facts present to his mind would think of saying that the person in question had died without issue, or had left no issue.

Starting, then, with this prima facie, though no doubt flexible, meaning of the word "issue," it is to be noted here that all through the settlement of the residue on the testator's daughter there is a very careful and marked distinction between the use of the word "issue" and the use of the word "children," and that the former word is used throughout in its strict meaning of descendants generally. While the fund goes in default of appointment to the children only of the daughter, she is, in accordance with the usual practice, given power to appoint amongst issue, and it is recognized that the issue amongst whom she may so appoint include issue who may be born at any time within twenty-one years after her death. Further, the will contains a hotchpot clause, again in ordinary form, under which there has to be brought into account against the share of a child in the unappointed fund any share that may have been appointed either to that child or to his or her issue. This is followed by a power of advancement, which is carefully limited to children only, and does not extend to issue. And then comes the gift over, which again is quite carefully drawn so as to take effect only if there is no "child" who attains a vested interest, and so as to apply only to so much of the fund as may not have become vested, i.e. under an appointment to children or issue, or have been applied, i.e. under the power of advancement to children. Down

to this point the provisions are a model of careful drafting, in which the distinctions between children and issue and the respective rights and expectations of children and issue are most carefully preserved.

Then come the two gifts which have to be construed in the present proceedings. The first is a gift of part of the trust estate in the terms following, namely: "In trust for such of the class of persons following, namely, my brothers and sisters living at the death of the survivor of my said wife and daughter, and the issue then living of my brothers and sisters dying in the lifetime of the survivor of my said wife and daughter, as shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parents." The second is a gift of the residue of the trust estate in the terms following, namely: "Upon trust for such of the class of persons following, namely, my brothers and sisters and the brothers and sisters of my said wife living at the death of the survivor of my said wife and daughter, and the issue then living of my said brothers and sisters and the brothers and sisters of my said wife dying in the lifetime of my said wife and daughter, who shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parents." It will be noticed that the provision in the second gift, that issue shall represent their deceased parents, is in precisely the same language as the corresponding provision in the first gift. So that the provision is no hasty or haphazard one —which indeed would be inconsistent with the careful drafting of the other parts of the will—but is one couched in deliberate terms that are carefully repeated.

The contention that "issue" in both these gifts is limited to children depends entirely on the provision contained in each of these gifts, that issue are to represent their deceased parents. And, if there had been no previous context to the contrary, I think this contention would probably have prevailed. The words as to representation seem to me to read more naturally if they are limited to the representation of a deceased brother or sister of the testator by the children of that brother or sister than if they are extended so as also to include a representation of a deceased child or grandchild of a deceased brother or sister by the children of such a deceased

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child or grandchild. Here, as in *Pruen* v. *Osborne* (1), *Smith* v. *Horsfall* (2), and other cases of the kind, the only persons expressly mentioned as donees under the original gift, and for whose decease provision is expressly made, are the first generation, that is the testator's brothers and sisters. It is therefore natural to limit provisions for representation to the case of this generation, and when this is done, the force of the word "parent" almost necessarily limits the class of introduced representatives to the next succeeding generation. Or, in other words, the present case would have been entirely within the principle of such cases as *Pruen* v. *Osborne* (1), *Smith* v. *Horsfall* (2), and *In re Timson* (3), and would naturally have been decided in the same way.

But, though a clause of substitution or representation of this kind may be most naturally read in the way in which it was read in the last three cases that I have mentioned, yet this is only a prima facie result; such a clause is quite susceptible of being construed so as to provide for representation in each successive generation, and will be so construed if there is a counter-context sufficiently distinct to prevent the application of the ordinary rule: see *Ross* v. *Ross* (4), as approved in *Ralph* v. *Carrick* (5), and *In re Timson*. (3) And on the whole, having regard to the very careful distinction between children and issue that has been drawn and preserved in the previous part of the will, and to the studied character of the language of the two gifts immediately in question, I think that more violence would be done to the language of the will, taken as a whole, by abruptly changing the use of the word "issue" from its full meaning to its more limited meaning than by reading the words of substitution as applying generally rather than as being limited to a single generation. And, accordingly, I am of opinion that in these two gifts the word "issue" includes grandchildren as well as children—there is no question of any more remote generation—and that the first question and the first part of the second question in this summons must be answered in accordance with the second alternative mentioned in each case.

The second part of the second question in the originating summons

(1) 11 Sim. 132.
(2) 25 Beav. 628.
(3) [1916] 2 Ch. 362.
(4) 20 Beav. 645.
(5) 11 Ch. D. 873

purports to raise for determination the question whether the clause as to representation applies to, and brings in, as donees under the second of the two gifts I have referred to, nephews and nieces of the testator's wife whose parents died in the testator's lifetime. This statement of the question is, however, not quite accurate. It is admitted on all hands that the representation clause applies as to any parent who died between the date of the will and the date of the testator's death, and that this is so as to both gifts. What is really desired to be determined is something arising only as regards the second gift, and as to two only of the wife's nephews and nieces, and is whether nephews and nieces are excluded whose parents died before the date of the testator's will.

Here, again, there is a good deal of authority, but in this case I think that the conclusion to be drawn is fairly clear. The gift here to the issue is an out-and-out original gift, and is not substitutional, or even partly substitutional. Nor do I attach any importance to the word " said " in this second gift as implying that the parent must have been a possible taker. The word does not occur in the first gift or in that second part of the second gift which brings in the wife's relatives. And its use in the first part of the second gift seems to be only a recognition that the first class of takers under the second gift have already been benefited as the sole class under the first gift. Further, I do not find in the participle " dying " any such definite connotation of futurity as renders it necessary to restrict the words of representation to brothers or sisters of the testator's wife who should die subsequently to the will. Accordingly, in my opinion, the present case falls within the principle and reasoning of such cases as *Coulthurst* v. *Carter* (1) and *Heasman* v. *Pearse* (2), and these nephews and nieces must be included in the class to take.

I propose to answer the second part of the second question in the summons by declaring that nephews and nieces of the testator who were living at the date of the death of the testator's daughter and attained the age of twenty-one years, but whose parents died in the testator's lifetime, are entitled to participate—and then I follow the language of the summons, and I add these words—whether such parents died prior to the date of the will or not.

(1) 15 Beav. 421. (2) L. R. 7 Ch. 275.

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There is a third subsidiary point, whether F. B. Rodwell and his brothers take more than one share, inasmuch as they are descended both from a collateral of the testator and from a collateral of the testator's wife. This is a very curious point of no general interest, and to which no general principle is applicable, and I can only look at the bare words of the will. Under the words of the will prior to the proviso each of these persons would prima facie take a share, so that collectively they would take more than two shares. Then comes the proviso which prevents their getting more collectively than their deceased parents would have taken. The words are: "So that the issue shall participate only as representing their deceased parents." Their deceased parents would of course have taken two shares, and the words of the proviso prevent these persons, though more numerous than two, taking more than the two shares that their deceased parents would have taken; but I cannot see how it cuts them down any further, or limits them to one share only. Accordingly, as regards that subsidiary point, which is not raised, I think, in terms in the summons, I decide that those persons take together two shares.

Solicitors for all the parties except the defendant George Rodwell: *Collyer-Bristow, Curtis, Booth, Birks & Langley.*

Solicitors for G. Rodwell: *Stanley, Woodhouse & Hedderwick.*

F. E.

IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND *v.* PASQUALI.

C. A.
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[1917 I. 338.]

ASTBURY J.
Feb. 27, 28; *March* 1, 8.

In re IMPERIAL TOBACCO COMPANY'S TRADE MARKS.

[1917 I. 535.]

C. A.
May 20, 30.

Trade Mark—Infringement—Rectification of Register—Seven Years' Registration—Common and ordinary Word—"Regimental"—No distinctive User—Alleged Infringement by Use of "Regiment"—No Evidence of Passing-off—Removal of Mark—"Disentitled to protection in a Court of justice"—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 35, 41.

If a trader chooses to register an absolutely common and ordinary word, such as "Regimental," as his trade mark, the use by another trader of an equally common and ordinary word, such as "Regiment," resembling his mark is no infringement, unless the first trader proves that his mark has acquired a secondary meaning distinctive of his goods, or that there is an appreciable risk of passing-off.

So *held* by Astbury J.

A common and ordinary word such as "Regimental," which, though not common to the tobacco trade at the time of registration, was in common use by regiments in connection with their respective brands of mess cigarettes, ought never to have been registered as a trade mark for tobacco or cigarettes.

So *held* by Astbury J.

But *held* by the Court of Appeal, that the fact that a registered trade mark was, at the time of its registration, not properly registrable as not coming within s. 9 of the Trade Marks Act, 1905, or the corresponding sections of the earlier Acts, does not render it "disentitled to protection in a Court of justice" within the meaning of s. 41; and after the lapse of seven years from the date of registration it cannot on that ground be removed from the register under s. 35.

Decision of Astbury J. on this point reversed.

Wigfull v. *Jackson* [1916] 1 Ch. 213 overruled.

WITNESS ACTION and ORIGINATING MOTION.

On October 27, 1885, F. & J. Smith, of Glasgow, tobacco manufacturers and dealers, registered the words "Regimental Cigarettes" as a trade mark for cigarettes.

In 1893 they put out special "leaf-tipped" cigarettes which they sold by weight as "Smith's Regimental Cigarettes" and described as "leaf-tipped." For some years there was a moderately small

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business in these cigarettes, but by 1900 the sales had fallen considerably, and in recent years they had become practically extinct, as the public no longer cared for "leaf-tipped" cigarettes or cigarettes sold by weight.

In 1901 the plaintiffs took over the business and goodwill of F. & J. Smith, Glasgow, and carried it on under the same name as a branch of their business.

On May 15, 1908, the plaintiffs registered the word "Regimental" for manufactured tobacco, but made no change in their way of selling "Smith's Regimental cigarettes," of which there was then still a small sale.

In November, 1916, the defendant, a London tobacconist, who had never heard of the plaintiffs' "Regimental" cigarettes or their trade marks, began to sell packets of 20 and boxes of 50 or 100 cigarettes under the name of Pasquali's "The Regiment" High-Class Virginia cigarettes. They were not leaf-tipped and were not sold by weight. The packets and boxes were decorated with regimental crests.

These cigarettes rapidly acquired a large sale and reputation in no way built up on the reputation of the plaintiffs' cigarettes, now practically unknown.

In February, 1917, the plaintiffs heard that the defendant was using the word "Regiment" in this way and called on him to discontinue it, which the defendant refused.

On March 14, 1917, the plaintiffs commenced this action, alleging that the use of the word "Regiment" was an infringement of their trade marks and calculated to cause deception and passing-off, and asking for an injunction restraining infringement and passing-off.

The defendant denied the infringement and the passing-off, and on April 26, 1917, he applied to remove the marks on the ground (inter alia) that at the date of registration the common and ordinary word "Regimental" was not distinctive, but merely a laudatory or descriptive adjective purporting to recommend cigarettes to members of the Army. This was the way in which he used the word "Regiment," and he was entitled to do so under s. 44 of the Trade Marks Act, 1905. (1)

The evidence showed that for many years past and before the date of the first registration in 1885 it was a common practice for different

(1) See note on p. 232, post.

regiments to have their own crest on their cigarettes, and these were known in each regiment as the " Regimental " cigarettes.

The passing-off action failed on the evidence, and the case is as far as possible only reported on the questions of infringement and removal. The action came on for hearing before Astbury J. on February 27, 1918.

Walter K.C. and *Sebastian* for the plaintiffs. The word " Regiment " is an obvious infringement of both our marks. Even if the defendant is only using it as a description of his goods, s. 44 gives him no protection against our first mark registered under the earlier Act of 1883 (46 & 47 Vict. c. 57), s. 64: *In re Woodward's Trade Mark.* (1) His use of the word will clearly lead to confusion between our respective goods in the mind of the public.

Neither of our marks is liable to removal. The first mark is protected by s. 36, as, having no " direct " reference to the quality of the goods, it would be registrable under s. 9, sub-s. 4, and in any case, with its long distinctive user, it would be registrable under s. 9, sub-s. 5. A trader does not vitiate his mark by using his name with it. He only asserts his claim to it all the more forcibly. Adjectival marks may be registered under s. 9, sub-s. 4: *In re National Cash Register Co.'s Applications.* (2)

Again, both of our marks were honestly registered and therefore valid under s. 41, unless disentitled to protection under s. 11. That means disentitled at the date of registration and without regard to subsequent events: *In re Imperial Tobacco Co.'s Trade Marks* (3); *In re Woodward's Trade Mark.* (4) A laudatory epithet once honestly registered cannot be removed after seven years: *In re Joseph Crosfield & Sons* (5); unless it was common to the trade at the date of registration: *Wigfull* v. *Jackson.* (6)

Colefax K.C. and *J. Hunter Gray* for the defendant. There is no case of filching the plaintiffs' tiny business in their " Regimental " cigarettes. The defendant never heard of their brand, and he has in no way diminished their sale. By always selling their goods as

(1) [1915] W. N. 124; 32 R. P. C. 173, 196.
(2) [1917] Current Digest, 435; 34 R. P. C. 273, 281, 354.
(3) [1915] 2 Ch. 27, 36, 40.
(4) [1915] W. N. 124; 32 R. P. C. 173, 198.
(5) [1910] 1 Ch. 118, 142, 153.
(6) [1916] 1 Ch. 213, 217.

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"Smith's Regimental cigarettes" they have effectually prevented their mark becoming distinctive. There is therefore no case of passing-off.

Again, there is really no case of infringement of the word "Regimental." The defendant uses a different word, "Regiment," in conjunction with the name Pasquali and with a distinct get-up. There is no possible danger of confusion or passing-off. No doubt if "Regimental" had been an invented word, "Regiment" would probably be an infringement. But "Regimental" is a common and ordinary English word, and apart from passing-off "Regiment" is no infringement: Kerly on Trade Marks, 4th ed., pp. 431, 448; *Seixo* v. *Provezende* (1); *Edwards* v. *Dennis*. (2) Sect. 44 is obviously declaratory. No registration can interfere with a man's right to describe the character of his goods.

Both marks ought to be removed from the register. The first mark "Regimental cigarettes" was purely descriptive, like "Regimental champagne," "Club matches." It can only have been registered per incuriam under the 1883 Act. Not being distinctive, it could not have been registered under the 1905 Act, so that s. 36 is no protection. Similar objections apply to the second mark "Regimental," which is equally descriptive.

In *In re National Cash Register Co.'s Applications* (3) the word "National" was considered too wide to be descriptive of character, and there was thirty years' distinctive user. But here both marks are descriptive and non-distinctive. They both transgress s. 11. Sect. 41 is therefore no protection and they can be removed under s. 35: *Wigfull* v. *Jackson* (4); *In re Anderson's Trade Mark* (5); *In re Sharpe's Trade Mark*. (6)

Again, the first mark was never used as a trade mark in itself, but only in the collocation "Smith's Regimental cigarettes." The second mark was never used at all. They can therefore be removed under s. 37 for non-user: *Richards* v. *Butcher* (7); *In re Kuehnrich's Application*. (8)

(1) (1866) L. R. 1 Ch. 192, 196.
(2) (1885) 30 Ch. D. 454, 471.
(3) [1917] Current Digest, 435; 34 R. P. C. 273, 354.
(4) [1916] 1 Ch. 213, 217.
(5) (1884) 26 Ch. D. 409, 415; affirmed 54 L. J. (Ch.) 1084.
(6) [1915] Current Digest, 577; 32 R. P. C. 15.
(7) [1891] 2 Ch. 522, 543.
(8) [1913] Current Digest, 637; 30 R. P. C. 93, 677.

Austen-Cartmell for the registrar on the motion. I cannot defend the registration of the first mark. But it was in fact registered. The second mark was treated as a mere extension. Prima facie there would be a strong case for removal under s. 35. But s. 41 is a great extension of s. 76 of the 1883 Act and validates marks honestly registered, even in proceedings under s. 35, unless they transgress s. 11 by some inherent objection, e.g. by being common to the trade at the date of registration, as in *Wigfull* v. *Jackson* (1), but (semble) not for being laudatory or descriptive: *In re Joseph Crosfield & Sons.* (2) Sect. 37 is merely declaratory of the law in *Batt & Co.* v. *Dunnett* (3), to the effect that a trader must not block the register with marks that he has no intention of using. It does not seem applicable to the present case.

Walter K.C. in reply. The mark in *Wigfull* v. *Jackson* (1) was common to the trade at the date of registration, and the decision is undoubtedly sound. But it is no authority for saying that s. 41 is to be nullified to such an extent by s. 11 as to open up every conceivable objection de novo to the original registration. Suppose the Registrar in 1885 wrongly decided that "Regimental cigarettes" were "fancy words or words not in common use." His decision is not now impeachable on the ground that they were common laudatory words, unless they were common to the trade at the time. The first mark was capable of registration under s. 9, sub-s. 4, or s. 9, sub-s. 5, so that s. 36 as well as s. 41 is a protection to that mark.

Cur. adv. vult.

March 8. ASTBURY J. (after stating the facts). In considering whether the word "Regimental" is descriptive it is not without significance that the plaintiffs and their predecessors in title have always thought it desirable to describe their cigarettes as "Smith's Regimental," and have thus prevented, or assisted in preventing, a secondary distinctive meaning attaching to the word "Regimental," if such could ever have been the case.

Any case of passing-off on the facts being out of the question, the only two issues that I have to determine are those of infringement and the removal of the marks from the register. Apart from their

(1) [1916] 1 Ch. 213, 217.
(2) [1910] 1 Ch. 118, 142, 153.
(3) [1898] 2 Ch. 432; [1899] A. C. 428.

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marks, the plaintiffs in this action are free from any embarrassment of merits and have suffered no damage, and it is in these circumstances that I have to decide whether or not they are entitled to deprive the defendant of, or to interfere with his carrying on, an honest and lucrative business.

First as to infringement, I adopt the statement of the law in Kerly on Trade Marks, 4th ed. p. 431, namely, "Infringement is the use by the defendant, for trading purposes, upon or in connection with goods of the kind for which the plaintiff's right to exclusive use exists (i.e. goods in respect of which his mark is registered), not being the goods of the plaintiff, of a mark identical with the plaintiff's mark, or comprising some of its essential features, or colourably resembling it, so as to be calculated to cause goods to be taken by ordinary purchasers for the goods of the plaintiff."

In *Seixo* v. *Provezende* (1) Lord Cranworth said: "What degree of resemblance is necessary from the nature of things, is a matter incapable of definition a priori. All that Courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled."

In *Edwards* v. *Dennis* (2) Cotton L.J. said: "When the alleged infringement consists of using, not the exact thing upon the register, but something similar to it, the Court must, in considering whether there has been an infringement or not, proceed upon the old principle, which prevailed both at law and equity before the Act, that a man is not to pass off his goods as the goods of another."

It is true that "The Regiment" as a descriptive reference to goods differs little from "Regimental," but it is not the same, and in judging whether one word mark infringes another by mere colourable difference it is of first importance to have regard to the nature of the word said to have been infringed. A distinctive invented or fancy word has a much wider scope for colourable imitation than a word primarily descriptive, especially if the latter be one in common English use, and just as it is the policy of the present trade mark law in this country, except in the rare cases falling within s. 9, sub-s. 5, of the Act of 1905, to prevent applicants for registration from monopolizing ordinary English words which

(1) L. R. 1 Ch. 192, 196. (2) 30 Ch. D. 454, 471.

other people may or reasonably might desire to use to convey a meaning reasonably flowing therefrom, so I think the Courts should be careful to prevent any undue extension in this direction by holding that an ordinary and common word is an infringement by way of colourable imitation of another word, equally common and ordinary, which has been allowed in the past to find its way upon the register; and this is especially so when the user complained of on the part of the defendant is not, as in my judgment it has not been proved to be in this case, calculated to pass off his goods as and for those of the plaintiffs.

I am of opinion for these reasons that the defendant's description, Pasquali's "The Regiment" is not an infringement of the plaintiffs' marks or either of them, and this is emphasized by the following facts—first, that the word "Regiment" complained of is used in a different setting; secondly, that the goods are different; thirdly, that the method of sale is different; and, fourthly, that the defendant has a wholly distinctive get-up in his packets and boxes.

I have now to deal with the motion to remove the marks from the register. [His Lordship read ss. 11, 35, and 41, and continued:]

In *Wigfull* v. *Jackson* (1) it was decided that ss. 11 and 41 of the Act are to be read together, and that a trade mark which has remained unchallenged on the register for more than seven years may nevertheless be removed if at the date of its registration it was a mark common to the trade. Neville J. said: "In my opinion s. 41 is itself in terms subject to a proper construction of s. 11 of the same Act, and what I have to consider is whether a trade mark, which at the date when it was registered and ever since has been common to the trade, is disentitled to protection in a Court of justice. . . . . I think the reasonable interpretation of [s. 11] is that if the trade mark is disentitled to protection in a Court of justice, then, notwithstanding the lapse of seven years—s. 41 being expressly declared to except any trade mark which offends against the provisions of s. 11—it is not protected by s. 41. In the present case the question is, does the trade mark offend against the provisions of s. 11? In other words, is it disentitled in any way to protection in a Court of justice?" Then the learned judge states that he has been referred to two decisions of Eve J., *In re Imperial Tobacco Co.'s*

(1) [1916] 1 Ch. 213, 217.

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Trade Marks (1) and *In re Woodward's Trade Mark.* (2) He says that these being decisions of a judge of co-ordinate jurisdiction he should feel bound to follow them if applicable, which is, of course, the view I should also take. He then says: "[Those decisions] extend to this, that, if a trade mark is properly registered in the first instance, the fact that subsequent events have placed it in such a position that if the application to register were made to-day it would fail does not prevent the operation of s. 41, so that after seven years it is a good mark and can be sued upon and cannot be removed from the register. But [those decisions], in my opinion, [do] not apply to a case where upon the evidence it appears that at the time of the registration of the mark it was a mark which was not entitled to protection in a Court of justice, because it was an attempt on the part of an individual trader to monopolize a device which was the common property of the public, and particularly of those engaged in carrying on the trade in question. What I have to consider here is whether it is a mark which ought to be protected, and as soon as I find that at the time it was registered it was a mark which ought not to have been protected and ought not to have been registered, I am bound not only to refuse an injunction in an action upon it, but also to rectify the register by removing it."

I think this decision applies in substance to the present case. For years past it has been a practice in this country for different regiments to have their regimental crest stamped on their mess cigarettes, which are known as the regimental cigarettes, and this practice has largely increased during the present war. Other people might desire to apply the expression to cigarettes supplied to the men, especially perhaps to one well-known brand so dear to the British soldier at the present day, and the right to use this common and descriptive expression existed at the respective dates when the plaintiffs' marks were registered as fully, though not so widely made use of, as at the present time.

I think both marks were, at their respective dates of registration, disentitled to protection as being common and ordinary descriptive expressions applicable to cigarettes as well as to many other goods, and that no user has been shown or suggested which entitled either

(1) [1915] 2 Ch. 27, 36, 40.
(2) [1915] W. N. 124; 32 R. P. C. 173, 198.

mark to be registered at the respective dates when their registration was obtained.

The plaintiffs contend that s. 11 read in conjunction with s. 41 has nothing to do with the question whether a mark is or is not registrable. If this is so, s. 41, after the lapse of the period therein mentioned, would perpetuate as distinctive a mark that never was, and is incapable on the authorities of ever becoming, or on the facts has not become, such. This is not in my view the combined effect of ss. 11 and 41 at all, and fails to give effect to the words " or otherwise disentitled to protection " in s. 11. The protection intended to be afforded to traders by s. 41 does not, I conceive, contemplate any such extravagance.

In *In re Sharpe's Trade Mark* (1), where the registered mark " Classic " was removed, the law is most conveniently summed up on the question of the registrability of descriptive words. Kennedy L.J., giving the judgment of the Court of Appeal, said : " Taking, then, first, the question of the registrable character of the word ' Classic '—and we agree with Mr. Justice Warrington that it is only if the case can be brought within section 9 (5.) that the registration can be justified—we have to consider whether ' Classic ' constitutes a ' distinctive mark ' within the meaning of that enactment, a mark adapted to distinguish the goods of the plaintiffs from those of other persons. The statute in the closing paragraph of section 9 proceeds to tell us ' in determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered.' It appears to us to be authoritatively settled that there are certain kinds of words that cannot be treated as ' adapted to distinguish.' "

Kennedy L.J. then refers to the *Perfection Case* (2), where Cozens-Hardy M.R. said : " It is apparent that no word can be registered under this sub-section unless it is ' distinctive,' that is to say, is ' adapted ' to distinguish the goods of the proprietor from the goods of other persons. There are some words which are incapable of being so ' adapted,' such as ' good,' ' best,' ' superfine.' They

(1) [1915] Current Digest, 577 ; (2) [1910] 1 Ch. 130, 141.
32 R. P. C. 15, 23, 24, 25.

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cannot have a secondary meaning as indicating only the goods of the applicant. There are other words which are capable of being so 'adapted,' and as to such words the tribunal may be guided by evidence as to the extent to which use has rendered the word distinctive. It is easy to apply this sub-section to geographical words, and it is possible to suggest words having direct reference to character or quality which might be brought within it. But an ordinary laudatory epithet ought to be open to all the world, and is not, in my opinion, capable of being registered."

Kennedy L.J. then refers to the *Diamine Case* (1), where Buckley L.J. said: "The Act does provide that—not in every case—but in a particular case, namely, that in which (not the word but) the trade mark, is in actual use—the tribunal may take into consideration the extent to which user has rendered the trade mark distinctive. This goes to shew that except in the particular case the mark, and not the result of the user of the mark, is the thing to be regarded. It was held by this Court in *In re Joseph Crosfield & Sons* (2) that some words (instancing laudatory epithets) are not capable of being registered, but ought to be open to all the world. I assent. But this principle is not confined, in my opinion, to laudatory epithets. It extends so as to forbid the appropriation by one trader of any word forming part of the common stock of the English language, unless the word is one adapted to distinguish the goods in the sense which I have mentioned."

Kennedy L.J. then refers to the *W. & G. Case* (3), where Lord Parker said: "In my opinion, in order to determine whether a mark is distinctive it must be considered quite apart from the effects of registration. The question, therefore, is whether the mark itself, if used as a trade mark, is likely to become actually distinctive of the goods of the person so using it. The applicant for registration in effect says, 'I intend to use this mark as a trade mark, i.e., for the purpose of distinguishing my goods from the goods of other persons,' and the registrar or the Court has to determine before the mark be admitted to registration whether it is of such a kind that the applicant, quite apart from the effects of registration, is likely or unlikely to attain the object he has in view. The applicant's chance of success

(1) [1910] 2 Ch. 240, 245. (2) [1910] 1 Ch. 130.
(3) [1913] A.C. 624, 634.

in this respect must, I think, largely depend upon whether other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark, or some mark nearly resembling it, upon or in connection with their own goods. It is apparent from the history of trade marks in this country that both the Legislature and the Courts have always shewn a natural disinclination to allow any person to obtain by registration under the Trade Marks Acts a monopoly in what others may legitimately desire to use. For example, names (unless represented in some special manner) and descriptive words have never been recognised as appropriate for use as trade marks. It is true that they became registrable for the first time under the Act of 1905, but only if distinctive, and they cannot be deemed distinctive without an order of the Board of Trade or the Court. This restriction does not apply to marks consisting of a letter or combination of letters, but before such a mark be accepted the registrar or the Court has to be satisfied that it is adapted to distinguish the goods of the applicants from those of others. It need not necessarily be so adapted, and whether it is or is not so adapted appears to depend largely on whether other traders are or are not likely to desire in the ordinary course of their business to make use in connection with their goods of the particular letter or letters constituting the mark."

Kennedy L.J. then continues (1): "In our view 'Classic' is, in the language which I have clearly quoted from the judgment of the Master of the Rolls in the '*Perfection*' *Case* (2), a word incapable of being treated as 'adapted to distinguish,' or as having a secondary meaning as indicating only the goods of the applicant."

On the true construction of ss. 41 and 11 read together I think that this again is an authority which applies to the present case.

The plaintiffs have pressed me with the *National Case* (3), but the facts in that case and the present are entirely different, and there is nothing in the judgments of Sargant J. and the Court of Appeal either in law or in fact which in my view conflicts with anything I have said or referred to in this judgment.

For these reasons I am of opinion that the defendant is entitled

(1) 32 R. P. C. 26.
(2) [1910] 1 Ch. 130, 141.
(3) [1917] Current Digest, 435; 34 R. P. C. 273, 354.

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to an order on his motion removing the marks and to judgment in the action.

Action dismissed with costs. Motion allowed with costs, including the costs of the registrar.

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The plaintiffs appealed against the decision of Astbury J. upon the motion. The appeal came on for hearing on May 20, 1918.

Walter K.C. and *Sebastian* for the appellants. The question on the appeal is as to what protection is given by s. 41 to a trade mark which has been upon the register unchallenged for seven years. The section provides that the original registration shall be taken to be valid in all respects unless it was obtained by fraud, or unless the trade mark offends against the provisions of s. 11 of the Act. Astbury J. has held that these marks do so offend as being "disentitled to protection in a Court of justice," and his reason for holding that they are so disentitled is that they ought not to have been registered as they were debarred from registration by reason of not fulfilling the requirements of s. 9, in the case of the first mark, because it is said to have direct reference to the character of the goods, and in the case of the second, because it is a laudatory and descriptive word commonly used in the trade. In coming to that conclusion he followed the decision of Neville J. in *Wigfull* v. *Jackson* (1), but it is submitted that that case was wrongly decided. In *In re Joseph Crosfield & Sons* (2) Cozens-Hardy M.R. said that a laudatory epithet, if allowed to be registered, could not be removed after seven years. The question did not arise directly there, but it was argued by the Board of Trade.

As to the words "or otherwise" in s. 11, the only authority throwing light upon their meaning is the decision of Chitty J. in *In re Anderson's Trade Mark* (3), which was a case under s. 6 of the Act of 1875 (38 & 39 Vict. c. 91). Sect. 11 is a proviso upon s. 9, and the words "disentitled to protection in a Court of justice" do not mean disentitled by reason of not coming within s. 9. If a mark is not registrable within s. 9 it does not require s. 11 to shut

(1) [1916] 1 Ch. 213. (2) [1910] 1 Ch. 130, 142.
(3) 26 Ch. D. 409.

it out. The words "disentitled to protection in a Court of justice" refer to something intrinsic in the mark.

[WARRINGTON L.J. Something insulting, for instance, or calculated to cause a breach of the peace.]

Yes, that is a good illustration. The words "or otherwise" are treated in Kerly on Trade Marks, 4th ed., p. 308, as redundant. In *In re Faulder's Trade Mark* (1) it was held that although the word there in question was descriptive when used for a certain article it was not thereby "disentitled to protection" within the meaning of s. 11. [They also referred to *In re Arbenz's Application* (2) and *In re Smokeless Powder Co.'s Trade Mark.* (3)]

The word "Regimental" as applied to cigarettes has no reference to the character or quality of the goods. It is in terms within s. 9, sub-s. 4: *In re National Cash Register Co.'s Applications* (4); see also *In re Imperial Tobacco Co.'s Trade Marks* (5), *Edwards* v. *Dennis* (6), and *Baker* v. *Rawson.* (7)

The marks ought to be allowed to remain on the register. They do not interfere with the rights of others having regard to the proviso to s. 41 and to s. 44.

Colefax K.C. and *J. Hunter Gray* for the respondents. The argument for the appellants leads to this result, that although there may be something on the register which is not and never was a registrable trade mark, yet, having regard to s. 41, it cannot after seven years be removed unless the registration has been obtained by fraud or the mark is against morality. The suggested interpretation of s. 41 is founded upon *In re Faulder's Trade Mark.* (1) Unless what is on the register is a trade mark, s. 41 has no application. Unless the mark satisfies the requirements of s. 9, s. 41 is not available for its protection. The words "or otherwise" in s. 11 have to be construed with reference to "deemed to be disentitled to protection." It is said that they must be construed on the principle of ejusdem generis, but they are as wide as possible.

The registration of the first mark, "Regimental cigarettes," in

(1) (1900) 18 R. P. C. 37, 41, 535.
(2) (1887) 35 Ch. D. 248.
(3) [1 ?] 1 Ch. 590.
(4) [1917] Current Digest, 435; 34 R. P. C. 273.
(5) [1915] 2 Ch. 27.
(6) 30 Ch. D. 454.
(7) (1890) 45 Ch. D. 519.

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1885 was wholly wrong: s. 64 of the Act of 1883. It is said that s. 36 of the Act of 1905 prevents that objection being taken, but that throws you back to s. 9. This never was a registrable trade mark; and yet it is said that s. 41 makes the registration valid for all time.

As to the second mark, registered in 1908, the evidence is that there was never any intention of user as a trade mark. The word was always used in connection with "Smith & Co.'s."

As to the meaning of "disentitled to protection," a mark which is on the register, but was not registrable under the old Act or under the new Act, comes within s. 11. The words "or otherwise" include the case of a mark which at the date of registration ought not to have been registered. In such a case the mark may be taken off notwithstanding the lapse of seven years: *Wigfull* v. *Jackson.* (1)

[SWINFEN EADY M.R. It is not disputed that that case is in your favour, but it is open to review in this Court.]

If the register is burdened by a mark that does not distinguish the goods of the proprietor it is not entitled to protection. This mark has not become distinctive under s. 9, sub-s. 5: *In re Woodward's Trade Mark.* (2) In *In re Palmer's Application* (3) Lindley L.J. says: "I am satisfied that a trade-mark which is not a trade-mark, and which therefore ought not to have been registered, does not become a trade-mark by being on the register for five years." That was under the Act of 1875 (38 & 39 Vict. c. 91), but the scheme of the Acts is the same.

Austen-Cartmell for the registrar. It was held under the old Acts that if a trade mark was not properly registered it might be removed at any time. The effect of s. 41 of the Act of 1905 is to estop after the lapse of seven years any challenge of a mark on the ground that it is not within s. 9; but it still leaves the registration open to attack if it was obtained by fraud, in which case the registrar has power to rectify under s. 35, even after seven years.

As to s. 11, it is submitted that the decision in *In re Woodward's Trade Mark* (2) was not correct. It was too limited. Eve J. there held that the moment was the date of registration. The effect of the words at the end of s. 41 is that if at any time the mark offends against s. 11, then it ought to come off the register. Marks which

(1) [1916] 1 Ch. 213. R. P. C. 173.
(2) [1915] W. N. 124; 32 (3) (1882) 21 Ch. D. 47, 60.

were good at the time of registration may afterwards become contrary to law, and if that happens they ought to be removed from the register despite the lapse of seven years. Sect. 11 is a proviso to s. 9. But when it is read in connection with s. 41 it must be treated as not limited to registration but as applying also to rectification of the register. If a mark does become calculated to deceive by user or otherwise, then it ought to be taken off although originally it may have been rightly registered.

Walter K.C. in reply.

SWINFEN EADY M.R. This is an appeal by the Imperial Tobacco Company, Limited, from an order of Astbury J. directing two trade marks to be removed from the register. An action was brought by the company against the defendant for passing-off and for infringement of registered trade marks. That action was dismissed. The passing-off was not established, and the learned judge held that the registered trade marks had not been infringed. There is no appeal in respect of that matter, but upon an application by the defendant in the action that the two marks should be removed from the register an order was made by the judge removing them as asked, and it is from that order alone that the present appeal is brought. The first mark was an old mark registered on October 27, 1885, "Regimental cigarettes." The second was registered on May 15, 1908, and consists of the word "Regimental." In November, 1916, the defendant in the action began to sell cigarettes under the description of "Pasquali's the Regiment," and that was held to be no infringement.

The learned judge has ordered both marks to be removed from the register on the ground that they offend against s. 11 of the Trade Marks Act, 1905. With regard to the first of the two marks, "Regimental cigarettes," it is urged by the respondent on the appeal, who was successful on the application to take the mark off the register, that the mark "Regimental cigarettes" ought never to have been registered, because it has direct reference to the character of the goods, and therefore is not within s. 9, sub-s. 4, of the Trade Marks Act, 1905. With regard to the second mark, the word "Regimental" alone without any addition, it is said that that word was and always has been a descriptive and laudatory adjective

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which other sellers of cigarettes were entitled to use, and that it was a word commonly used in the trade as a descriptive word, and therefore was incapable of registration and ought not to have been registered, having regard to s. 9 of the Act of 1905, which prescribes the essentials which a registered trade mark must contain or consist of. The learned judge has accepted the contentions put forward on behalf of the respondent, and has directed both marks to be removed from the register. It will be observed from the dates of registration that each of the marks has been registered for a period exceeding seven years, the first having been registered in 1885 and the second in 1908. It is provided by s. 41 of the Act of 1905 that in all legal proceedings relating to a registered trade mark, including applications under s. 35 of the Act—and this is an application under s. 35 to take the marks off the register—" the original registration of such trade mark shall after the expiration of seven years from the date of such original registration . . . . be taken to be valid in all respects unless such original registration was obtained by fraud "—there is no suggestion of that in the present case — " or unless the trade mark offends against the provisions of section 11 of this Act." Pausing there, it is common ground that the marks are to be taken to be valid in all respects unless they offend against the provisions of s. 11. There is no suggestion that the original registration was obtained by fraud, but the respondent's case is based on s. 11. It is said that the trade marks cannot now be taken to be valid, as they offend against the provisions of s. 11. Sect. 11 contains a prohibition as to what it shall not be lawful to register, and it follows upon s. 9, which provides for the essentials of a registrable trade mark. Sect. 9 provides that a registrable trade mark must contain or consist of at least one of certain essential particulars, and then it details them, five in number. Then s. 11 provides that it shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality. It will be observed that that is a prohibition, an enactment against registration—" It shall not be lawful to register as a trade mark "—and in my opinion that section is a qualification upon s. 9. Sect. 9 points out what a registrable trade mark must contain or consist of, and unless it

contains or consists of one or other of the essentials there enumerated it is not a registrable trade mark, and it is only registrable trade marks that are entitled to registration. No prohibition is required against anything which does not come within s. 9, because there is no authority to register it. But even if a mark comes within one or other of the sub-sections of s. 9 that alone is not necessarily sufficient to entitle it to registration, because it may offend against s. 11. Even if a mark does contain or consist of one or more of the essentials enumerated in s. 9, still it is not lawful to register it if the mark, or part of it, contains any matter the use of which is calculated to deceive, or is otherwise disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design. Sects. 11 and 41 must be construed together. In my opinion s. 41 forms a new departure in dealing with trade marks. The section departs widely from the language used in the previous statutes of 1875 and 1883. Under those Acts it was held by the Court of Appeal in *In re Palmer's Application* (1) that the Court was bound to consider whether the trade mark was properly on the register, and although it may have been on the register for five years, which was the period provided for in the earlier Acts, if it ought not to have been on the register at all, then it ought to be taken off. Sect. 41 of the Act of 1905 proceeds upon entirely different grounds. It contains an express enactment that the original registration of the trade mark shall, after the lapse of seven years, be taken to be valid in all respects, and what is to be taken to be valid in all respects is the registration of the trade mark, unless it offends against the provisions of s. 11. Sect. 11 is therefore a prohibitive section as to matter which is disentitled to protection in a Court of justice, which I think means in any Court of justice. It is a restriction upon the registration. It is intended to exclude from registration what would otherwise be included in or covered by s. 9. In my opinion it does not extend to and does not include what the respondent argues that it does include. It does not extend to a mark which was not originally entitled to protection, because it did not contain or consist of one of the essential particulars under s. 9. It does not extend to that at all. It is addressed to a different state of circumstances. The restriction is addressed to " matter the use of

(1) 21 Ch. D. 47.

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which would by reason of its being calculated to deceive "—it has not been argued that either of the marks registered here is calculated to deceive—" or otherwise be disentitled to protection." In the earlier statutes the phrase was "not entitled to protection": here it is "disentitled to protection," and the words "or otherwise" would extend to and include a matter which intrinsically from its nature no Court of justice would protect. That is, not only by reason of its being calculated to deceive, but by reason of the nature of the matter itself, as if it were blasphemous, or obscene or indecent, or seditious. These are instances of matters which, having regard to their nature, a Court of justice would not protect. Then the section proceeds, "or would be contrary to law or morality, or any scandalous design." The only way in which it is attempted to bring the two marks in question within this section, the only way in which it was argued that the two marks offend against the provisions of s. 11, is by saying that they are disentitled to protection, which means, or is equivalent to, "that they are not entitled to protection because they ought not originally to have been registered as valid trade marks as coming within section 9." I am satisfied that that is not the true construction of the section. You have only to compare the analogous provisions in the previous statutes of 1875 and 1883 with the language of ss. 40 and 41 of the Act of 1905 to see the considerable extension in favour of protecting marks that is given by the later legislation. By s. 41 it is enacted that in all legal proceedings relating to a registered trade mark, including applications under s. 35, which provides for applications to rectify the register, the registration is to be taken to be valid in all respects except in one or other of two events. The first is unless such original registration was obtained by fraud. That is a new provision, and it was intended to extend to those cases in which the registering officer had been deceived, and where, if the full facts had been ascertained at the time of the registration, the registration would never have been allowed. It prevents a person, even after seven years, retaining the benefit of a registration which itself was obtained by fraud. The second event is offending against the provisions of s. 11. In my opinion that is limited in the way that I have explained, and does not extend to or include a case in which the mark originally ought not to have been

registered because it did not contain one or more of the essential particulars. It will be observed that if the section be construed in accordance with the opinion which I have expressed the rights of individual traders will be protected both by the proviso in s. 41 and by the provisions of s. 44. The proviso in s. 41 is that nothing in the Act shall entitle the proprietor of a registered trade mark to interfere with or restrain the user by any person of a similar trade mark upon or in connection with goods upon or in connection with which such person has by himself, or his predecessors in business, continuously used such trade mark from a date anterior to the user of the first-mentioned trade mark by the proprietor thereof, or his predecessors in business. So that if he had so used the mark he cannot be interfered with. Again, the registered proprietor is unable to object to such person also being put upon the register for such similar trade mark he has so used. Then s. 44 provides that no registration under the Act shall interfere with any bona fide use by a person of his own name, or place of business, or that of any of his predecessors in business, or the use by any person of any bona fide description of the character or quality of his goods, so that such user may still continue to be taken advantage of notwithstanding this registration. The argument which was addressed to us really amounted to this: that any mark which for any reason ought not to have been registered might at any time thereafter be removed. In my opinion such a contention cannot be allowed to prevail. The learned judge below followed the decision of Neville J. in *Wigfull* v. *Jackson* (1), and he states the ground upon which his judgment proceeded as follows: "I think both marks were, at their respective dates of registration, disentitled to protection as being common and ordinary descriptive expressions applicable to cigarettes as well as to many other goods, and that no user has been shown or suggested which entitled either mark to be registered at the respective dates when their registration was obtained." In other words, his decision was that neither of them was a mark which ought to have been registered having regard to s. 9, and it is on that ground that he proceeded. In my opinion the mere fact that marks ought not to have been registered because they do not comply with the requisites of s. 9 is not sufficient, and does not bring them within the provisions of s. 11. Neville J. in *Wigfull* v.

(1) [1916] 1 Ch. 213.

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Jackson (1) directed the register to be rectified by removing a mark which it appeared from the evidence was common to the trade at the date of the registration, although that fact was not known to the party registering, who had registered in good faith, and in ignorance of the extended user of the mark in different parts of the country. Neville J., after referring to a previous decision of Eve J., said (2): "But that decision, in my opinion, does not apply to a case where upon the evidence it appears that at the time of the registration of the mark it was a mark which was not entitled to protection in a Court of justice, because it was an attempt on the part of an individual trader to monopolize a device which was the common property of the public, and particularly of those engaged in carrying on the trade in question. What I have to consider here is whether it is a mark which ought to be protected, and as soon as I find that at the time it was registered it was a mark which ought not to have been protected and ought not to have been registered, I am bound not only to refuse an injunction in an action upon it, but also to rectify the register by removing it." That was a case in which the user of the mark by the plaintiffs had been purely local, and in their local business they had not come across any of the numerous instances of the use of the "wheatsheaf" in the trade which were proved in Court. In other words, although it appeared by subsequent evidence that the mark registered was in common use in the trade at the date of the registration, the parties registering were not aware of that, and registered in good faith and had been on the register for the statutory time. That being so, I am of opinion that the criticism of the learned judge that it was a mark not entitled to protection in a Court of justice because it was an attempt on the part of an individual trader to monopolize a device which was the common property of the public, and particularly those carrying on the trade in question, was not well founded, and although, if the facts had been known, it might well be that it was a mark which ought not to have been registered, still, having once been registered, it does not come within the provisions of s. 11 as being disentitled to protection in a Court of justice. In my opinion the case of *Wigfull* v. *Jackson* (1) was wrongly decided, and the foundation of the judgment of the Court below fails.

(1) [1916] 1 Ch. 213. (2) [1916] 1 Ch. 218.

In my judgment the construction of this Act is reasonably free from doubt. The contention put forward that every mark not properly registered—that is to say, every mark to which originally there was a valid objection to its registration—is disentitled to protection in a Court of justice within the meaning of s. 11 cannot be maintained. I am of opinion that no ground has been shown for bringing either of the marks within s. 11. Neither offends against s. 11, and, that being so, the order directing the marks to be removed from the register was erroneous and ought to be reversed, and the appeal allowed.

WARRINGTON L.J. I am of the same opinion. This is an appeal from an order of Astbury J. directing the Register of Trade Marks to be rectified and expunging therefrom two marks belonging to the Imperial Tobacco Company. One of these marks was registered so long ago as the year 1885; and the other was registered in 1908. In the one case more than seven years have elapsed since the passing of the Act of 1875, and in the other more than seven years have elapsed since the registration of the mark; prima facie therefore under s. 41, the registration of the mark is valid. Sect. 41 applies to proceedings for rectification, and therefore one would suppose that the application to expunge the mark would fail. Astbury J. has, however, made an order expunging both marks, and he has done it, to use his own words, on the ground that both the marks were at their respective dates of registration disentitled to protection as being common and ordinary descriptive expressions applicable to cigarettes as well as to many other goods. Now I understand that to mean that he has expunged these marks from the register because he is of opinion that neither of them was a registrable mark, as to one under the joint operation of the Act of 1883 and the Act of 1905, and as to the other under the Act of 1905 alone. The question for decision is whether that ground for rectification of the register can be relied upon when the period of seven years provided for by s. 41 of the Act of 1905 has elapsed. Sect. 41 is in these terms: [The Lord Justice read the section, and continued:] Looking at that section without reference to the terms of s. 11, can it reasonably be construed as meaning that the original registration shall be taken to be valid in all respects unless the mark was one which ought not

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to have been registered? That is only, in other words, saying "shall be taken to be valid in all respects unless it is shown to be invalid," which is not the provision of the section. Moreover, when you compare s. 41 with s. 40 you find that s. 40 provides that before the expiration of the seven years—these words are not in the section, but that is the effect of it—in all legal proceedings relating to a registered trade mark, including applications under s. 35 of this Act, the fact that a person is registered as proprietor of such a trade mark shall be prima facie evidence of the validity of the original registration of such mark. Before the seven years the fact that the person is registered as a proprietor is prima facie evidence of the validity of the registration. Under s. 41 the original registration is to be taken to be valid for all purposes, and counsel for the respondent found it impossible on his construction of s. 41 to point to any objection which could be taken under s. 40 on an application to expunge a mark which could not be taken under s. 41. That to my mind demonstrates, with all respect, the absurdity of a construction which would expose the registration to attack on some ground which would impeach the original registration; but it may be so, and one has to look at s. 11 to see whether the exception referred to in s. 11 from the general words of s. 41 does not in fact allow such an objection as that to which I have referred to be taken, notwithstanding the expiration of the seven years. Fraud in this case is out of the question, and the only exception with which we have to deal is that which is expressed in the words "unless the trade mark offends against the provisions of section 11 of the Act." Now s. 11 follows upon the definition in s. 9 of the particulars which a registrable trade mark must contain, or of which it must consist. It is a prohibition. It is in these terms: [The Lord Justice read the section, and continued:] Sect. 9 having provided for the particulars that are essential to a registrable trade mark, that is to say, for those things which it is lawful to register, the Legislature has, I think, under s. 11 inserted a provision in the nature of a qualification of, or proviso to, s. 9—that is, you shall not register certain matters which may come within s. 9, but which are open to objection on other grounds. To say that s. 11 prohibits the registration of a mark which because it is not within s. 9 is not entitled or is disentitled to protection in a Court of justice seems to me to attempt to do that

which is unnecessary, because such a matter could not have been registered by reason that it did not come within s. 9, and therefore there was no occasion to prohibit it. It seems to me that the section must be a prohibition against registering something which but for the prohibition might have been registered. Now if that is the true construction of s. 11 nothing more need be said about it. I think that that is the true construction is seen not only from the consideration to which I have already referred by comparing it with s. 9, but when you look at the section itself. It seems to me that it points to something which has, inherently, a vice disentitling it, according to the general principles of law which are acted upon in any Court of justice, from protection in a Court. It is not disentitling it to protection in this Court, or that Court, or any other particular Court, but disentitling it to protection in a Court of justice. One can find many instances of such a matter. One instance is given in the section itself, "calculated to deceive." The matter in question might be libellous. It might be calculated to produce a breach of the peace. It might offend against the ordinary views of mankind on religious subjects. There are many instances of which one can think of matters which would in that sense be disentitled to protection in a Court of justice, and it is to such matters, in my opinion, that s. 11 is directed, and not to the absence of qualities entitling the mark to registration under s. 9. With reference to *Wigfull* v. *Jackson* (1), on which Astbury J. has founded his judgment, I agree that in reversing that judgment we are overruling at all events the reasons of Neville J., if not his actual decision. The reason which he gave is this: "What I have to consider here is whether it"—the mark he was dealing with—"is a mark which ought to be protected, and as soon as I find that at the time it was registered it was a mark which ought not to have been protected and ought not to have been registered, I am bound not only to refuse an injunction in an action upon it, but also to rectify the register by removing it." In my judgment the reasons he gave there are inconsistent with the judgment we are pronouncing and must be treated as incorrect. I do not express any opinion whether there was any other sufficient reason in that case for removing the mark from the register.

Then it was said that this mark did not come within s. 41 at all,

(1) [1916] 1 Ch. 213, 218.

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because it was not "a registered trade mark." With all respect, that contention is open to two fatal objections. It was said it was not "a registered trade mark" because it was not a "trade mark." And it was said it was not a trade mark, or rather that neither mark was a trade mark because neither had been used, or was proposed to be used, upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark. The objection to the form of user was that the name of the proprietor had been used together with the trade mark. The appellants' boxes bore the words "Smith's Regimental Cigarettes," or "Smith's Regimental." In my judgment the fact that a manufacturer places his name or uses his name upon or in connection with the goods as well as his trade mark does not prevent the trade mark from being used for the purpose of indicating that they are the goods of the manufacturer, and in so saying I am only repeating what has already been said by Buckley L.J. and Hamilton L.J. in *Andrew* v. *Kuehnrich*. (1) But there is another answer to that argument derived from s. 41 itself. Unless the registered trade mark is a "trade mark" the registration cannot be valid. The validity of the registration is established under s. 41, and that, to my mind, imports also that the mark itself must be treated as a "trade mark," and being registered is a "registered trade mark." Therefore that point, in my opinion, fails also.

With regard to Mr. Cartmell's argument on behalf of the Board of Trade, I express no opinion whether it would be possible to remove a mark from the register after the expiration of the seven years by reason of some fact happening since the registration rendering the mark calculated to deceive, or otherwise offend against s. 11. I hold that the appeal succeeds and must be allowed, and the order of Astbury J. reversed.

DUKE L.J. I am of the same opinion. The respondent in this case was allowed to support his motion for removal of the appellants' trade marks from the register on the ground mainly that the trade marks were not registrable at the time they were registered. The contention involved a resort to the principle which was laid down in the judgment of Neville J. in *Wigfull* v. *Jackson* (2), which was

(1) 30 R. P. C. 695, 697. (2) [1916] 1 Ch. 213.

accepted by Astbury J. in the present case, and which, to give it the full effect to which the respondent relied upon it, goes to the length of deciding that as soon as you find that at the time a trade mark was registered it was a mark which ought not to have been registered it may be removed from the register, notwithstanding the lapse of any number of years. With regard to the first matter, the matter of what one might call the merits of the facts in regard to these particular trade marks, I confess that for myself I do not see anything in the authorities which have been cited here to lead me to hold that the words "Regimental cigarettes" and the word "Regimental" have any direct reference to the character or quality of the appellants' goods; and if that were the decision of the Court it would dispense with the necessity of considering the effect which is sought to be given to s. 41 of the Act of 1905. But the judgments which have been delivered by the Master of the Rolls and by my brother Warrington do not proceed upon that ground, as I understand, and it is necessary to consider whether the decision of Neville J. in *Wigfull* v. *Jackson* (1) was a correct exposition of the true effect of the sections in question in the statute of 1905. It is said on the part of the respondent that, although it may be that s. 41 of the Act of 1905 was intended to give some sort of protection to the proprietor of a registered trade mark after the lapse of seven years from the time of registration, or the passage of the Act, which was not possessed by other persons, nevertheless, if it were found that the trade mark ought not to have been registered, there was no protection for the registered proprietor. That result is arrived at by a process of interpretation of s. 11 of the Act of 1905, an interpretation of two general words in s. 11 in such a way as to deprive the present appellants and to deprive all registered proprietors, as it seems to me, of any protection under s. 41. I agree that s. 11, when you come to consider its terms, is fairly plainly expressed as a qualification or proviso upon the operation of s. 9. For myself I confess I do not feel oppressed with the difficulty which the respondent's counsel feel in saying what class of matters are described in the words "disentitled to protection in a Court of justice." As I said to counsel in argument, if his client came to him and said: Tell me in general terms what is the class of transaction in respect of

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which a man is disentitled to protection in a Court of justice, counsel would not have any difficulty in stating within broad limits what that class of transaction is. In my opinion s. 11 is clearly intended to subject trade marks which do comply with the requirements of s. 9 to additional requirements in respect of legality, and these general requirements of the law in respect of legality which govern transactions between parties are very well understood, both in the Courts of Common Law and in the Courts of Equity, as matters which invalidate transactions or which deprive parties of the protection of the Court. I confess I should have thought that upon consideration of s. 11 itself, but when I find that the proposed construction of s. 11 is such as to reduce the protection, which s. 41 was intended evidently to give, to a mere absurdity and deception, I am greatly fortified in the view I take as to what was in the mind of those who framed this Act. And if the true view is that the grounds on which s. 11 is offended against are grounds which exclude further consideration of the questions dealt with by s. 9 and matters of the general principles of law, then the decision at which Neville J. arrived, and at which the learned judge in this case arrived, is erroneous and this appeal ought to be allowed.

Appeal allowed.

Solicitors: *McKenna & Co. for E. Robert Still, Bedminster, Bristol; Urquhart Fisher & Co.; Solicitor, Board of Trade.*

NOTE.

The Trade Marks Act, 1905, provides as follows:—

Sect. 11: "It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design."

Sect. 35: "Subject to the provisions of this Act—(1.) The Court may on the application . . . . of any person aggrieved . . . . by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register . . . . make" an order for expunging the entry.

Sect. 36: "No trade mark which is upon the register at the commencement of this Act and which under this Act is a registrable trade mark

shall be removed . . . . on the ground that it was not registrable under the Acts in force at the date of its registration . . . ."

Sect. 37: "A registered trade mark may . . . . be taken off the register in respect of any of the goods for which it is registered, on the ground that it was registered . . . . without any bona fide intention to use the same in connexion with such goods, and there has in fact been no bona fide user . . . . in connexion therewith, or on the ground that there has been no bona fide user . . . . during the five years immediately preceding the application, unless in either case such non-user is . . . . due to special circumstances in the trade, and not to any intention not to use or to abandon such trade mark in respect of such goods."

Sect. 41: "In all legal proceedings relating to a registered trade mark (including applications under s. 35 . . . .) the original registration . . . . shall after the expiration of seven years from the date of such original registration (or seven years from the passing of this Act, whichever shall last happen) be taken to be valid in all respects unless such original registration was obtained by fraud, or unless the trade mark offends against the provisions of s. 11 . . . ."

Sect. 44: "No registration under this Act shall interfere with . . . . the use by any person of any bona fide description of the character or quality of his goods."

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May 29; *June* 6.

[1917 R. 1094.]

Revenue—Income Tax—Colonial Tax—Corresponding Relief—Company—Preference Shares—Fixed Dividend—Ordinary Shares—Benefit of Relief—Proper Deduction from Dividends—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 40, 54—*Finance Act*, 1916 (6 & 7 *Geo.* 5, *c.* 24), *ss.* 24, 43.

An English company that, owing to its having paid Colonial income tax, has obtained a rebate or repayment of 1*s.* 6*d.* in the pound on its British income tax under the Finance Act, 1916, s. 43, cannot deduct full British income tax from its dividends under the Income Tax Act, 1842, s. 54, but can only deduct the net British income tax it has actually borne.

SPECIAL CASE.

The defendant company was registered on May 15, 1895, as a company limited by shares to take over the undertaking of a previous company and to carry on the business of brewers. Its business was mainly in South Africa, where the income tax was 2*s.* in the pound.

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The capital was now 2,000,000*l.* divided into one million preference and one million ordinary shares of 1*l.* each, of which one million preference and 965,279 ordinary shares were issued and fully paid.

The plaintiff had held 500 preference shares since June 25, 1917, and 1300 ordinary shares since August 14, 1916.

The respective rights of the shareholders were fixed by the articles.

By article 133 the preference shareholders are entitled to a cumulative preferential 5 per cent. dividend, and to priority for their capital in a winding up, but no right to further participation in surplus assets.

By article 134 the company in general meeting may declare a dividend to be paid to the holders of the ordinary and preferred shares according to their rights and interests in the profits.

By article 135 no larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend.

By article 136 no dividend shall be payable except out of profits.

By article 137 the declaration of the directors as to the amount of the net profits shall be conclusive.

By article 138 the directors may from time to time pay to the holders of the ordinary shares such interim dividends as in their judgment the position of the company justifies.

The financial year of the company ended on March 31 in each year.

On November 28, 1916, the directors declared and paid an interim dividend in respect of the half-year ending September 30, 1916, at the rate of 2½ per cent. on the preference and 5 per cent. on the ordinary shares. Income tax was deducted at 3*s.* 6*d.* in the pound, the income tax voucher stating that as relief in respect of South African income tax had been granted the shareholders were not entitled to make a separate claim in that respect, and that claims for relief in respect of incomes not exceeding 2000*l.* would only be allowed on the excess of the 3*s.* 6*d.* deducted over the rate chargeable on the shareholder. As appears below, the relief granted was to the extent of 1*s.* 6*d.* in the pound.

In their report, dated July 23, 1917, in respect of the year ending March 31, 1917, the directors recommended a final dividend of

2½ per cent. on the preference shares (making 5 per cent. for the year) and 5 per cent. on the ordinary shares (making 10 per cent. for the year), and on July 31, 1917, these dividends were declared at the general meeting.

On paying these dividends the company deducted 5*s.* income tax on the preference and 3*s.* 6*d.* on the ordinary share dividends.

The income tax voucher for the preference dividend certified that United Kingdom income tax at the rate of 5*s.* in the pound on the company's profits of which the dividend formed part had been or would be paid to the proper officer for the receipt of taxes in England, and that a repayment of that tax at the rate of 1*s.* 6*d.* in the pound had been or would be allowed to the company in respect of South African income tax on those profits; that the company's shareholders were not entitled to make a separate claim in that respect; and that claims for relief in respect of incomes not exceeding 2000*l.* would only be allowed on the excess of the 3*s.* 6*d.* over the rate chargeable on the shareholder. The income tax voucher for the ordinary dividend was to a similar effect, stating the deduction at 3*s.* 6*d.*

The plaintiff contended that the company was only entitled to deduct the 3*s.* 6*d.* actually paid. The company relied on the Income Tax Act, 1842, and the Finance Act, 1916. (1)

The details of the assessment leading to the deduction were as follows:—For the year 1916-17 the company, who had paid 2*s.* income tax in South Africa, was assessed to United Kingdom income tax at 50,587*l.* 5*s.*, being 5*s.* in the pound on its assessable profits. Having applied for relief under the Finance Act, 1916, s. 43, it was excused payment of 15,176*l.* 3*s.* 6*d.*, being 1*s.* 6*d.* in the pound on its assessable profits, and was only required to pay 35,411*l.* 1*s.* 6*d.*, being 3*s.* 6*d.* in the pound on those profits.

It will be observed that the exact procedure of s. 43 was not followed, but it was agreed that this made no difference in principle.

The plaintiff contended that the benefit of the 1*s.* 6*d.* allowance accrued alike to the preference and ordinary shareholders, but the company did not admit this contention.

The Court was therefore asked—

1. Whether in paying the final dividend on the plaintiff's

(1) See note on p. 241, post.

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preference shares the company was entitled to deduct income tax at 5*s.* ?

2. Whether the company was bound to repay or account to the plaintiff for the difference between the tax deducted at 5*s.* and a tax deductible at 3*s.* 6*d.* ?

3. Whether in paying future dividends on preference shares the company would be entitled to deduct full British income tax or British income tax less the allowance under s. 43 ?

Hon. Frank Russell K.C., *Bremner*, and *J. F. Carr* for the plaintiff. The plaintiff is entitled to his full 5 per cent. dividend less any amount properly deducted under s. 54. That section, though using the words " duty so charged," really only allows a deduction of the British tax actually paid : *Attorney-General* v. *Ashton Gas Co.* (1) ; *Johnston* v. *Chestergate Hat Manufacturing Co.* (2) The company paid the Colonial duty as an ordinary outgoing not deductible from the shareholders under s. 54 : *Spiller* v. *Turner.* (3) No doubt in the present financial position of the company the burden of the Colonial tax falls on the ordinary shareholders. But they did not pay it. The company paid it, and that payment has not been recouped. The relief given by s. 43 is not a return of Colonial tax, but an abatement of British tax, and in the present case the amount of British tax finally paid by the company was 5*s.* less the 1*s.* 6*d.* relief allowed or returned, i.e. an actual payment of 3*s.* 6*d.* This is the only amount that can be deducted under s. 54.

Again, although the company was the taxpayer, the British tax was really paid on behalf of all the shareholders : *Attorney-General* v. *Ashton Gas Co.* (4) ; *Brooke* v. *Inland Revenue Commissioners* (5) ; and any relief obtained by the company in respect of British tax would belong to the same persons, no matter on what ground that relief was obtained. It is really part of the declared dividends and cannot be retained by the company. If the company is entitled to deduct 5*s.* from the preference dividends it is clear from the form of the income tax voucher that a preference shareholder with an income below taxation limit would only recover 3*s.* 6*d.* from the

(1) [1904] 2 Ch. 621, 623.
(2) [1915] 2 Ch. 338, 343.
(3) [1897] 1 Ch. 911.
(4) [1904] 2 Ch. 627, 628, 629 ; [1906] A. C. 10, 11.
(5) [1917] 1 K. B. 61, 70 ; [1918] 1 K. B. 257, 270.

Crown and would be permanently mulcted of the 1*s.* 6*d.* Again, if the company were wound up, before obtaining relief, the 1*s.* 6*d.* which is really part of the preference dividend, would go to general assets if and when recovered.

P. O. Lawrence K.C., *Hon. W. Finlay K.C.*, and *Tyrrell T. Paine* for the company. The British tax was charged at 5*s.*, and that amount ought to have been deducted from the preference and ordinary dividends. The object of s. 43 was relief against double taxation. The person who pays Colonial tax is alone entitled to that relief. In the present case the company paid the Colonial tax and was entitled to keep the 1*s.* 6*d.* relief. The plaintiff did not pay it, nor was it paid on his behalf: *Spiller* v. *Turner.* (1) Suppose the company had been able to pay the dividends without deducting British tax, leaving the shareholders to pay it. The plaintiff could not have alleged that he had paid any Colonial tax so as to get relief under s. 43. He would have had to pay 5*s.* British tax. Why should he pay less because he is taxed at the source?

Again, the company is the real taxpayer, not the shareholder: *Purdie* v. *Rex.* (2) It pays tax on a three years' average profit and gets relief accordingly. But it declares dividends out of the current year's profit. Those dividends become part of the shareholders' income, which is taxable as such. The provisions for deducting tax on the dividends are only machinery for collecting the shareholders' tax at the source. The company's tax and the shareholders' tax are two distinct things. It is true that in *Attorney-General* v. *Ashton Gas Co.* (3) and *Brooke* v. *Inland Revenue Commissioners* (4) it is said that the company pays the tax as agent for the shareholders. But that is only a loose way of saying that it deducts their tax at the source. If the plaintiff's contention is correct, then either the preference shareholders are a privileged class paying only 3*s.* 6*d.* British tax, or if the Crown can recover the 1*s.* 6*d.* from them the allowance made to the company under s. 43 is pro tanto nugatory. No doubt the company's argument virtually gives the benefit of the relief to the ordinary shareholders. But that

(1) [1897] 1 Ch. 911.
(2) [1914] 3 K. B. 112, 116, 117.
(3) [1904] 2 Ch. 627, 628, 629; [1906] A. C. 11.
(4) [1917] 1 K. B. 61, 70; [1918] 1 K. B. 257, 270.

ASTBURY J. is quite reasonable, as they have really borne the burden of the Colonial tax.

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Hon. Frank Russell K.C. in reply.

Cur. adv. vult.

June 6. ASTBURY J. (after stating the facts). In these circumstances the plaintiff objects to the deduction of 5*s.* in the pound from his dividend, contending that the company has only the right to deduct therefrom 3*s.* 6*d.*, and he claims that the company is bound to repay or account to him for the difference. The company contends that the provisions of s. 43 of the Finance Act, 1916, accrue for its benefit only, and that the 5*s.* deduction is authorized by the above statutory provisions. The decision of this question and the passing of s. 43 may have far-reaching effect, and it may not be easy to determine the length to which the framers of the section contemplated its extending when the "person" in question is a limited company registered in this country. It is clear that the company, on declaring the dividend for the year ending March 31, 1917, became liable to pay the whole of it to its shareholders less only such deduction as it was authorized by s. 54 of the Act of 1842 to make. This deduction is limited to British income tax, and, although the words of the section refer to the allowance of duty "charged," it clearly in my judgment means charged in the sense of "paid or payable."

In *Attorney-General* v. *Ashton Gas Co.* (1) Buckley J., speaking of dividends paid free of income tax, said that the shareholder receives "an indemnity against a liability to pay part of [the dividend] to the Revenue, or allows a deduction by the company of such part as the company has paid to the Revenue for income tax."

In *Johnston* v. *Chestergate Hat Manufacturing Co.* (2) Sargant J. said: "Under s. 54 . . . . it seems to me that strictly the shareholders are bound to have distributed amongst them, by way of burden, the amount which the company has actually paid as tax in the year in question."

As regards the shareholders in this country, the Colonial tax is not a duty charged within the meaning of s. 54, but is an outgoing of the company on the same footing as any other administrative expense in the Colony, which has to be satisfied before any profits

(1) [1904] 2 Ch. 621, 623. (2) [1915] 2 Ch. 338, 343.

can be ascertained and distributed by way of dividend. The real question is whether the company in the circumstances I have referred to was charged and paid 5*s.* or 3*s.* 6*d.* in the pound for British income tax for the year 1917 within the meaning of s. 54. If the former, it was right in making the 5*s.* deduction from the plaintiff's dividend. If the latter, it still owes to him the unpaid portion of the dividend that he became in law entitled to upon the declaration of dividend being made.

The company contends that under s. 43 the person who pays both Colonial and British tax is the only person entitled to recover the 1*s.* 6*d.* in the pound and keep it. It is said that the shareholder has not paid Colonial tax, and therefore does not bring himself within the benefit of the section. The company further says that if the plaintiff succeeds, he and those in his position will become a privileged class of British taxpayers escaping with the payment of 3*s.* 6*d.* in the pound. It is also urged that as between the company and the plaintiff the former did in effect pay 5*s.* in the pound for British tax, and it was only on proof of this that the right to repayment arose under s. 43, although the matter was, as between the company and the Crown, dealt with in account, as I have stated.

I think that the company, having paid both the taxes in the first instance, is the person entitled to the repayment of the 1*s.* 6*d.*, but the question remains, when it has obtained the same, whether it can reasonably and in truth be said to have paid or become liable to pay 5*s.* in the pound for British tax. It seems to me that the whole object of s. 43 was that this payment or liability should be reduced as therein provided, and it is difficult to see how a company which has paid 5*s.* on the terms that it should immediately be repaid 1*s.* 6*d.* part of it can be said after such repayment to have expended more than 3*s.* 6*d.*

If this is so, it follows that the only deduction authorized by s. 54 of the earlier Act is 3*s.* 6*d.*, and that the balance 1*s.* 6*d.* of the dividend is still unpaid and payable. Whether the plaintiff on receiving this amount will be liable to account for it to the Crown to make up his income tax to 5*s.* in the pound is a question which is not before me for decision, but whether as a corporator he is within the benefit of s. 43 or not is irrelevant on the question whether as between himself and the company he has or has not been paid the

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whole of the dividend to which he became legally entitled. Although the company is directly liable by the Act of 1842 to pay income tax on its profits, which is really machinery for collection of the tax at its source, so much as is paid on that part of the profits which is distributed by way of dividend is deemed to be paid on behalf of the corporators.

In *Attorney-General* v. *Ashton Gas Co.* (1) in the Court of Appeal Romer L.J. said: "If the profits, after deducting the income tax, have subsequently to be distributed amongst the members of the company, that income tax is not payable again by those members so far as they receive their share of the profits, because the income tax is to be taken as having been paid out of their profits, and on their behalf. If, for example, a company such as this had preference shareholders as well as ordinary shareholders, and the preference shareholders were only entitled to receive out of the profits a fixed sum, say 5 per cent., then, when income tax is paid by the company out of its profits, the company must be treated in respect of so much of the profits as is going to the preference shareholders as having paid their income tax in respect of their 5 per cent. Accordingly, to my mind, it is clear on principle in such a case that there ought to be deducted from the dividend warrants payable to the preference shareholders the income tax on the 5 per cent. which had been previously paid on their behalf by the company." In the same case (2) in the House of Lords Lord Halsbury, speaking with reference to the payment of income tax by a company, said: "There is a somewhat difficult and complex machinery which makes the officers of the company officers of the Financial Department of the Government for the purpose of collecting the tax."

The corporators in the company are chargeable with the tax: *Brooke* v. *Inland Revenue Commissioners* (3), per Atkin J., and the company, in paying their tax at the source, pays as their agent: *Brooke* v. *Inland Revenue Commissioners* (4), per Scrutton L.J.; and the deduction provisions of s. 54 of the Act of 1842 are, having regard to the provisions of s. 40 of the same Act, necessary to avoid, and are only intended to have the effect of avoiding, a double payment of tax on the same profits.

(1) [1904] 2 Ch. 621, 629.
(2) [1906] A. C. 10, 11.
(3) [1917] 1 K. B. 61, 70.
(4) [1918] 1 K. B. 257, 270.

This right of the company to recoup itself the amount it has so paid away, and would be otherwise out of pocket, is not, in my judgment, a right in the exercise of which it can make a profit, the very nature of the right being inconsistent with anything of the kind. Under the combined effect of s. 54 of the 1842 Act and s. 43 of the 1916 Act the only allowance that the plaintiff is bound by statute to submit to is an allowance of what has been paid on his account in respect of British tax, and not of a sum which the company has not been called upon to pay, and has not in fact paid, in respect of that tax. If the company's contention were to prevail, it would be exercising a right of recoupment as against the preference shareholders for the benefit of the ordinary shareholders who have not made or provided for the original payment in respect of which the statutory allowance alone must be made.

Again, if the company is right in its submission, a preference shareholder whose total income tax was so small as to entitle him to recover the whole of the tax deducted from his dividend would be left in the position of having paid 1*s.* 6*d.* in the pound for which he was not liable in law, as I can hardly conceive the authorities would repay him 5*s.* for every 3*s.* 6*d.* they had obtained for British tax.

Again, if the company were wound up after deducting 5*s.* from the dividend and before recovering back the 1*s.* 6*d.*, would the latter sum, which was paid by the preference shareholders in the first instance, go, when recovered by the liquidator, to the person from whose dividend it was deducted, or would it be a contribution out of his pocket towards debts, expenses, or distribution of surplus assets which he was in no way liable to pay or provide? The answer seems to me, as between the company and the shareholder, to be reasonably clear.

For the reasons I have endeavoured to explain I am of opinion that the company is legally bound to account to the plaintiff for the 1*s.* 6*d.* in the pound which is in question in this case.

Solicitors: *Bircham & Co.; Paines, Blyth & Huxtable.*

NOTE.—The Income Tax Act, 1842, provides as follows:—
Sect. 40: "All . . . . companies . . . . shall be chargeable with

ASTBURY J. such and the like duties as any person will under and by virtue of this Act be chargeable with."

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Sect. 44: "Where any . . . . officer of any . . . . company . . . . shall be so assessed in respect of such . . . . company . . . . it shall be lawful for every such person who shall be so assessed, by and out of the money which shall come to his hands . . . . as such . . . . officer to retain so much and such part thereof from time to time as shall be sufficient to pay such assessment; and every such . . . . officer shall be and is hereby indemnified against every person . . . . company . . . . for all payments which he shall make in pursuance and by virtue of this Act."

Sect. 54: "Every such officer . . . . shall also . . . . prepare and deliver . . . . a true and correct statement of the profits and gains to be charged on such . . . . company . . . . computed according to the directions of this Act, together with such declaration of the manner of estimating the same as aforesaid; and such estimate shall be made on the amount of the annual profits and gains of such . . . . company . . . . before any dividend shall have been made thereof to any other persons . . . . having any share right or title in or to such profits or gains; and all such other persons . . . . shall allow out of such dividends a proportionate deduction in respect of the duty so charged."

The Finance Act, 1916, provides as follows:—

Sect. 24: "Income tax for the year beginning on April 6, 1916, shall be charged at the rate of five shillings."

Sect. 43: "If any person who has paid, by deduction or otherwise, United Kingdom income tax for the current income tax year on any part of his income at a rate exceeding 3*s.* 6*d.* proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment of a part of the United Kingdom income tax paid by him equal to the difference between the amount so paid and the amount he would have paid if the tax had been charged at the rate of 3*s.* 6*d.*, or, if that difference exceeds the amount of tax on that part of his income at the rate of the Colonial income tax, equal to that amount.

"In this section the expression 'United Kingdom income tax' means income tax charged under the Income Tax Acts; and the expression 'Colonial income tax' means income tax charged under any law in force in any British possession or any tax so charged which appears to the Special Commissioners to correspond to United Kingdom income tax."

G. R. A.

In re TATTERSALL'S SETTLEMENT. PUBLIC TRUSTEE *v.* TATTERSALL.

[1917 T. 1066.]

PETERSON J.

1918

April 18 19, 24.

Revenue—Estate Duty—Separation Deed—Fund settled by Wife—Life Annuity to Husband varying according to Income of Fund—Other Annuities after Wife's Death—Incidence of Duty—Method of Adjustment—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 8, *sub-s.* 4; *s.* 9, *sub-s.* 1; *s.* 14, *sub-s.* 1.

By a separation deed a trust fund was settled by the wife upon trust out of the income to pay an annuity of 400*l.* to the husband during the joint lives of himself and the wife, and subject thereto to pay the income to the wife for life. After her death the income was to be applied in paying (1.) the husband's annuity of 400*l.*, (2.) an annuity of 300*l.* to the wife's testamentary appointee, (3.) 400*l.* per annum for the maintenance of the infant son of the marriage during his minority, and (4.) 400*l.* per annum to him after his majority during his and the husband's joint lives. The husband's annuity in any year was to abate or increase proportionately as the total income received by the trustee from the fund in that year fell below 1250*l.* or rose above 1300*l.*

Upon the wife's death in November, 1913, no estate duty became payable in respect of the husband's annuity, and the estate and settlement estate duty payable in respect of the benefit accruing to the other beneficiaries had been raised by a charge on the fund and paid, but the proposal of the trustee to sell part of the fund and pay off the charge raised the question of the ultimate incidence of the duty as between the parties interested in the income, which, owing to the war, had fallen far below 1250*l.* per annum :—

Held, that, as between the husband and the other beneficiaries, the husband was entitled to throw the burden of the duty on the interests in respect of which the claim had arisen; and that the husband was entitled to receive an annuity, calculated in accordance with the provisions of the deed, on the basis that the aggregate income of the year, ascertained by adding to the income actually received by the trustee the amount of the interest which would have been payable if the charge were still subsisting, represented the total income received by the trustee for that year.

ADJOURNED SUMMONS.

Under a separation deed dated November 15, 1911, the wife, Mrs. Tattersall, settled certain shares which had been transferred to the Public Trustee and were therein called "the Shares Fund" upon trust—omitting the parts unnecessary for the purposes of this

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report—in the first place out of the dividends and income thereof to pay to her husband, the defendant Mr. Tattersall, during their joint lives an annuity of 400*l.* out of the income, and subject thereto to pay the income of the shares fund to Mrs. Tattersall for her life. After the death of Mrs. Tattersall the income was to be applied in paying (1.) the annuity of 400*l.* to the husband; (2.) an annuity not exceeding 300*l.* to such relative within certain degrees of the wife as she should by will appoint during the joint lives of the defendant George Kenneth Tattersall (the son of the marriage) and such relative, or any less period; (3.) a sum not exceeding 400*l.* per annum during the son's minority to be applied for his maintenance; and (4.) a similar sum to be paid to him on attaining twenty-one during the joint lives of himself and the husband; subject as aforesaid the income of the shares fund was to be paid to the husband during his life. After the death of the husband, and subject to the foregoing trusts, the shares were settled on trust for the son for life and then for his family. The annuity of 400*l.* in favour of the husband, whether before or after the death of his wife, was subject to the following proviso: "Provided always that if in any year the total income of the shares fund received by the Public Trustee shall be less than 1250*l.* the sum payable to the husband shall in that year be reduced to a sum bearing the same proportion to the sum actually received by way of income as the sum of 400*l.* bears to the sum of 1250*l.*, and that if in any year the total income of the shares fund received by the Public Trustee shall be more than 1300*l.* the sum payable to the husband shall in that year be a sum bearing the same proportion to the sum actually received by way of income as the sum of 400*l.* bears to the sum of 1300*l.*"

Mrs. Tattersall died on November 12, 1913, having appointed an annuity of 300*l.* to her sister, the defendant Violet Knowles.

On Mrs. Tattersall's death, duty became payable. The Inland Revenue authorities decided that no benefit accrued to Mr. Tattersall by reason of the cesser of Mrs. Tattersall's interest (Finance Act, 1894, s. 2, sub-s. 1 (*b*)), and that the duty was to be assessed on the value of the shares after deducting the value of such portion of the shares as would be sufficient to provide Mr. Tattersall's annuity. The amount of the estate duty was raised by means of a charge on the shares, and it was proposed that settlement estate duty should be

paid in a similar way; but the Public Trustee intended, as soon as it was possible, to sell some of the shares for the purpose of clearing off the charges which had been created in this manner. In the meantime, owing to the war, the income derived from the shares had fallen far below the sum of 1250*l.* per annum.

This summons was taken out by the Public Trustee for determining the question whether the burden of the duty was to be borne by the capital of the shares fund generally, or how, as between the husband and the other annuitants interested in the income of the fund, the incidence of the duty was to be adjusted and borne.

H. S. Preston for the plaintiff.

L. W. Byrne for the defendant husband. The duty must be borne ultimately by the persons entitled according to their benefits accruing on the wife's death. No benefit then accrued and nothing passed to the husband, and no duty is chargeable against him; but the duty which is payable must be borne by the persons to whom the property passed in their proper proportions: *Berry* v. *Gaukroger* (1); *In re Countess of Orford.* (2) The duty must be raised according to the principle enunciated in *In re Parker-Jervis* (3), but not so as to interfere with the husband's annuity.

There is no "provision to the contrary" in the settlement within the meaning of s. 14, sub-s. 1, of the Finance Act, 1894; a provision by implication will not do; it must be "express."

C. J. W. Farwell for the infant defendant G. K. Tattersall. Estate duty and settlement estate duty are both on the same footing in this case, and are a charge on the whole of the shares fund. That being so, the trustee can raise the duty by sale or mortgage under s. 9, sub-s. 5. A sale will reduce the capital of the fund, and consequently the income of it, and the result of a sale and of the provisions of the settlement will be that the husband will receive a reduced annuity. The difficulty is not under the Act, but in applying the terms of the settlement. In the case of a fixed annuity the method of providing for the duty is settled by *In re Parker-Jervis* (3), which adopted the expedient of a notional sum, but has no application in ascertaining the fund which has to bear the duty:

(1) [1903] 2 Ch. 116. (2) [1896] 1 Ch. 257.
(3) [1898] 2 Ch. 643.

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In re Palmer.(1) Under this settlement the husband's annuity is not fixed, and *In re Parker-Jervis* (2) does not apply. On the death of the wife the old annuities ceased, and all the annuities payable afterwards are in reality new annuities, and the whole fund in fact passed on her death, and the duty is a charge on the whole fund. A particular annuity cannot be allocated to a particular proportionate slice of the fund. Unless the duty is a charge on the whole fund, the trustee might by selling a part of it vary the rights of the parties, and that cannot be. Sect. 7, sub-s. 7 (*a*), applies, but not s. 7, sub-s. 7 (*b*), as there has been no "addition to the property."

Further, I submit that the provisions of the settlement are an "express provision to the contrary" within the meaning of s. 14, sub-s. 1.

A. M. Latter for the defendant the wife's sister. I adopt the argument of the last defendant. The whole fund passed on the wife's death: per Rigby L.J. in *In re Earl Cowley's Estate* (3); *Lord Advocate* v. *Maclachlan* (4); Hanson's Death Duties, 6th ed. pp. 94-5; and the trustee is entitled to sell part of the fund to pay off the charge, thus reducing the income and diminishing the husband's annuity. That is the result of the settlement. It is not possible to work this out according to the rule in *In re Parker-Jervis.* (2)

Cur. adv. vult.

April 24. PETERSON J. stated the facts and continued: The question has now arisen how, having regard to the terms of the settlement and the provisions of the Finance Act, 1894, the duty ought to be borne as between the persons interested under the settlement. So long as the charges created for the purpose of raising the estate duty and settlement estate duty remain, there does not appear to me to be any difficulty. The total income derived from the shares will be received by the Public Trustee, and the amount of Mr. Tattersall's annuity will be determined by the total amount of the income received by the Public Trustee under the provisions of the deed; for the interest on the charges must in that case, having regard to s. 14, sub-s. 1, of the Finance Act, fall on the

(1) [1916] 2 Ch. 391.
(2) [1898] 2 Ch. 643.
(3) [1898] 1 Q. B. 355, 376.
(4) [1900] W. N. 204.

interests which have accrued by reason of the cesser of Mrs. Tattersall's interest. In other words, the interest on the charge will come out of that portion of the total income of the shares which, but for the charges, would be applicable to the payment of the annuities created in favour of Mrs. Knowles and Mrs. Tattersall's son, so that the annuity in favour of Mr. Tattersall will not be affected by the duty to which it is not subject. But it is argued that when the charges are paid off the position will be very different. In that case it is said that the total income derived from the shares will be diminished by the amount of the income derived from the shares which have been sold in order to clear off the charges, and that Mr. Tattersall will only be entitled to a reduced annuity which bears to the amount of income actually received by the Public Trustee the proportion which 400*l.* bears to 1250*l.* The result of this contention would be that Mr. Tattersall, although no duty is assessable in respect of his interest, would have to bear a portion of the loss of income occasioned by the duty which is payable in respect of that portion of the property in which other persons are interested by reason of the death of Mrs. Tattersall. This is said to be the result of the sale of the requisite number of shares to pay off the charges, although, so long as the charges subsist, Mr. Tattersall's annuity will not be affected, as the interest on the charges will be borne by the persons whose interests arise on the death of Mrs. Tattersall. This involves the proposition that, while the Public Trustee can under s. 9, sub-s. 5, raise the duties by sale or mortgage, the interests of Mr. Tattersall will not be affected if the Public Trustee mortgages the shares, but will be prejudicially affected if the Public Trustee exercises his power of sale. In other words, it is in the power of the Public Trustee to say whether his annuity shall or shall not be reduced. In my judgment I am not driven to this conclusion. I can accept the proposition that Mr. Tattersall can, under the deed, only claim an annuity the amount of which is determined by the total amount of the income actually received by the Public Trustee without coming to the conclusion that he has no further rights. This is a fund in which various persons are interested. The shares of some of them are subject to duty, while the share of another is not. If the duty is paid out of the aggregate fund, the rights of the persons interested must be adjusted so as to throw the

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duty on to the shares which are subject to it. Under s. 8, sub-s. 4, the Public Trustee was accountable for the duty on the property which passed on the death of Mrs. Tattersall, that is to say, on the value of the shares subject to Mr. Tattersall's annuity. But under that section not only the Public Trustee but also the persons beneficially interested in the property passing on the death of Mrs. Tattersall are accountable to the Crown for that duty; and the rights of the various persons interested are not affected by the fact that the duty is paid by the Public Trustee and not by the persons beneficially interested who were also accountable: see *Berry* v. *Gaukroger*. (1) While it is a well-established principle of equity that where several persons are liable in respect of the same obligation if one pays he is entitled to contribution from the others (see *Berry* v. *Gaukroger* (1)), it is equally clear that in the administration of a fund, where a liability of one beneficiary has been discharged out of the fund, those beneficiaries who are not subject to the liability are entitled to insist that by recoupment or adjustment the liability should, as between the persons interested, be thrown on to the beneficiary who is subject to the liability. Under s. 14, sub-s. 1, the Public Trustee, having paid the duty, is entitled to recover the proper rateable part of the duty from any person entitled to any annuity charged on the property; and consequently he is, in my judgment, entitled to call upon the persons interested in the annuities which accrued or arose on the death of Mrs. Tattersall to bear their proper proportions of the burden created by the duty, and Mr. Tattersall is entitled to require the Public Trustee to exercise this right.

It is said that the deed contains an express provision to the contrary within s. 14, sub-s. 1, inasmuch as it provides that Mr. Tattersall's annuity is to be determined by the amount of the income actually received, and, as the income actually received will be diminished by the amount of the dividends on the shares which are sold, he is only entitled to the reduced annuity. But while he would no doubt be affected by such incidents as a reduction of capital or a sale of some of the shares for the purpose of providing the costs incurred by the trustee in the general administration of the trusts, I am unable to read the deed as containing a provision which excludes

(1) [1903] 2 Ch. 116, 124, 133-4.

the rights of the beneficiaries to adjustment or to avail themselves of s. 14, sub-s. 1, of the Finance Act, 1894. In my judgment, then, by virtue of s. 8, sub-s. 4, and s. 9, sub-s. 1, and s. 14, sub-s. 1, Mr. Tattersall is entitled as between himself and the other beneficiaries to throw the burden of the duties on to the interests in respect of which the claim to duty has arisen. The question remains how the rights should be adjusted. While the charges remain Mr. Tattersall will take the annuity to which he is entitled under the deed, having regard to the total income received by the Public Trustee, the interest on the charges being paid out of that portion of the income which, but for the charges, would go to the persons whose interests arose on the death of Mrs. Tattersall. When the charges are paid off out of the proceeds of realization of some of the shares a similar principle should be applied, and I think that for the purpose of adjusting the rights of the various persons interested it will be fair that the interest which would have been payable if the charges were still subsisting should be added to the income actually received by the Public Trustee ; and Mr. Tattersall will be entitled to receive an annuity determined in accordance with the provisions of the deed on the basis that the aggregate thus ascertained represents the total income received by the Public Trustee.

Solicitors : *Stow, Preston & Lyttelton ; Colyer & Colyer.*

R. M.

EVE J.
1918
June 4, 5, 21.

LAWRENCE *v.* WEST SOMERSET MINERAL RAILWAY COMPANY.

[1917 L. 1392.]

Railway Company—Debenture Stock Holders—Interest not in arrear—No enforceable Charge—Railway not a Going Concern—Interest on Stock and Dividends on Shares paid out of Annuity from another Company—Capital or Surplus Revenue—Action to restrain Payment of Dividends to Shareholders—Protection of Security—Railway Companies Act, 1867 (30 *& 31 Vict. c.* 127), *s.* 23.

Under a statutory agreement made in 1868 the E. V. Company was to have the use of a railway belonging to the defendant company, and to pay in respect of such user, inter alia, a yearly sum of 5575*l.* for a contemplated term of years expiring in September, 1919, in respect of dividends and interest in the defendant company's share and loan capital. By a supplementary agreement made in 1898 the E. V. Company was relieved of its obligation under the earlier agreement to work the railway, but in other respects that agreement was confirmed. From that date no traffic was carried on the railway, which was in effect abandoned, and it was doubtful whether there would be sufficient assets in 1919 to provide in full for the loan capital. The 5575*l.* had been paid by the E. V. Company year by year to the defendant company and applied in paying interest on the loan capital, the expenses of management, and dividends on the preference and ordinary share capital. No interest was in arrear on the debenture stock. The plaintiff, suing on behalf of himself and all other the holders of debenture stock of the defendant company, claimed a declaration that the further payments to be received in respect of the 5575*l.* should be treated as capital and not as profits available for payment of dividends to shareholders:—

Held, that the defendant company was not bound to retain this annual surplus until the equilibrium between the value of the undertaking and the capital sunk in its construction had been restored, and that the distribution of the annual surplus was not illegal as being a payment of dividends out of capital.

Verner v. *General and Commercial Investment Trust* [1894] 2 Ch. 239 and *Ammonia Soda Co.* v. *Chamberlain* [1918] 1 Ch. 266 applied.

Held, further, that the plaintiff was not entitled to protect his security by bringing an action of this character, inasmuch as he had no enforceable charge, and was not a creditor, but an annuitant whose annuity was not in arrear.

Attree v. *Hawe* (1878) 9 Ch. D. 337 followed.

Wildy v. *Mid-Hants Ry. Co.* (1868) 16 W. R. 409 and *In re Liskeard and Caradon Ry. Co.* [1903] 2 Ch. 681 distinguished.

ACTION WITH WITNESSES.

On February 18, 1918, the plaintiff, James Edward Garnons

Lawrence, suing on behalf of himself and all other the holders of debenture stock of the defendant company, gave notice of motion in an action for an order that the defendant company might be restrained until judgment or further order from treating certain half-yearly sums payable to the defendant company by the Ebbw Vale Steel, Iron, and Coal Company during the years 1918 and 1919, under certain agreements, as profits available for distribution as dividends among the shareholders of the defendant company, and from paying out of the said sums any such dividends accordingly. There were no pleadings, the motion being treated as the trial of the action. The facts are taken verbatim from the judgment of the Court.

" The defendant company was incorporated by an Act passed on July 16, 1855, for the purpose of making and maintaining a railway from Watchet Harbour to Brendon Hills, in the county of Somerset, with the primary object of transporting to the harbour for shipment to South Wales the iron ore then lately found at Brendon. By virtue of an Act passed in 1869 the company's capital is 105,000*l.*, consisting of 30,000*l.* loan capital, represented by debenture stock bearing interest at 5 per cent., and 75,000*l.* in shares. By the last-mentioned Act an agreement then recently entered into between the company and the Ebbw Vale Steel, Iron, and Coal Company, Limited, whereby a lease of the undertaking to the Ebbw Vale Company for the term of fifty-one and a half years from March 25, 1868, was contemplated, was confirmed and made binding on the parties thereto. By the said agreement the Ebbw Vale Company was during the term to act as common carriers of all traffic on the railway ; the undertaking was to be kept in good repair and proper working order and condition, to the reasonable satisfaction of the Ebbw Vale Company, by the railway company ; and the railway company was also to provide and employ all such officers and servants on the railway as were proper and sufficient for the purpose of the traffic, and to pay all taxes, rates, assessments, and other outgoings in respect thereof. Under articles 10 and 12 the Ebbw Vale Company was to pay to the railway company in respect of the user by them of the railway (1.) the maximum tolls which the railway company might from time to time demand and take from the Ebbw Vale Company for the user thereof, and in addition such a

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sum as with the said tolls should in every year amount to 5575*l.* in respect of dividends and interest on the railway company's authorized share and loan capital; (2.) the amount of the expenditure of the railway company under the earlier clauses of the agreement already referred to; and (3.) all legal, engineering, and other revenue expenses properly incurred by the railway company in respect of the railway, including a rent-charge therein particularly mentioned. The net result contemplated by the arrangement was the working of the railway by the Ebbw Vale Company under conditions which would leave the railway company with a net rental of 5575*l.*, the exact sum required to pay 5 per cent. interest on the loan capital, 6 per cent. dividend on the 32,500*l.* preference share capital, and 5 per cent. dividend on the 42,500*l.* ordinary share capital.

"Work at the mine was discontinued and traffic on a part of the railway suspended in the year 1884, and in 1898 a further agreement was entered into between the Ebbw Vale Company and the railway company, whereby, in effect, the former company was freed from its obligations under the earlier agreement to work the railway so long as no order to work the same should be made by a Court of competent jurisdiction. From the date of this agreement down to the present time no traffic has been carried on the railway, and within the last eighteen months the rails have been removed and a large part of them taken possession of by the Minister of Munitions on behalf of the Government. In the meantime the Ebbw Vale Company has year by year paid to the railway company the 5575*l.*, and this has been applied in paying interest on the loan capital, expenses of management, and dividends on the preference and ordinary share capital. Not unnaturally the shareholders, in these circumstances, have refused to authorize any application to abandon the railway.

"The term created by the agreement of 1868 will expire in September, 1919, and in November last this action was commenced by the plaintiff, on behalf of himself and all other the holders of debenture stock of the railway company, against the railway company for—putting it shortly—a declaration that the further payments to be received by the railway company from the Ebbw Vale Company in respect of the 5575*l.* should be treated as capital and ought not to be dealt with as profits applicable for payment of dividends to shareholders, and for the consequential injunction."

E. P. Hewitt K.C. and *J. M. Paterson* for the plaintiff. It is a case of a railway company without a railway. The railway is practically derelict and can never be reopened and worked at a profit, according to the evidence. The debenture stock holders have a priority in respect of their charge and are entitled to protect it, as the assets will be insufficient to repay the loan advances. Under these circumstances the payment of dividends to shareholders out of moneys which, we contend, should be treated as capital, is unlawful. *In re Crighton's Oil Co.* (1), where Stirling L.J. said that a "dividend" meant a payment made to the shareholders while the company was a going concern. Here the company is not a going concern, and in September, 1919, there will no longer be any distribution of income. Other cases where the payment of dividends out of capital was considered are *Lee* v. *Neuchatel Asphalte Co.* (2), where there was a wasting property, and *Verner* v. *General and Commercial Investment Trust* (3), where there was loss of capital. In the latter case Lindley L.J. said that "a dividend presupposes a profit in some shape." In the present case the plaintiff is a creditor and has a charge in priority to the ordinary shareholders, but no present right to have a receiver appointed: *Hinds* v. *Buenos Ayres Grand National Tramways Co.* (4); *Mills* v. *Northern Ry. of Buenos Ayres Co.* (5); *In re Hull, Barnsley and West Riding Junction Ry. Co.* (6), where the effect of s. 23 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), was considered. A debenture stock holder in a statutory company is an incumbrancer and entitled to protect his security: *In re Liskeard and Caradon Ry. Co.* (7) In *Wildy* v. *Mid-Hants Ry. Co.* (8) a mortgage creditor of a railway company was held entitled to file a bill to protect his security where it was likely to be endangered, although the time fixed for payment of the mortgage money had not arrived. That applies in principle to the holder of debenture stock although his interest is not in arrear. Further, the directors of the company are quasi-trustees, and it is their duty as business men to set aside part of the funds coming to them for depreciation and loss of capital. [Reference was also made to *Bond*

(1) [1902] 2 Ch. 86, 95.
(2) (1889) 41 Ch. D. 1.
(3) [1894] 2 Ch. 239, 266.
(4) [1906] 2 Ch. 654.
(5) (1870) L. R. 5 Ch. 621.
(6) (1888) 40 Ch. D. 119.
(7) [1903] 2 Ch. 681.
(8) 16 W. R. 409.

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v. *Barrow Hæmatite Steel Co.* (1) and *Ammonia Soda Co.* v. *Chamberlain.* (2)]

Maugham K.C. and *E. E. H. Brydges* for the defendant company. The cases of *Wildy* v. *Mid-Hants Ry. Co.* (3) and *In re Liskeard and Caradon Ry. Co.* (4 are cases in which it was sought to enforce mortgage securities, and are distinguishable. In the former of those cases Lord Chelmsford enforced the claim of the mortgagee to protect his security with some doubt, and upon the authority of *Legg* v. *Mathieson.* (5) The present action is not, and could not be, one to enforce a security, and there is no precedent for it. The plaintiff is not a creditor, and has no charge which can be enforced. The holder of debenture stock has no right to interfere with the internal management of the company. The sum payable by the Ebbw Vale Company is treated as income under the terms of the agreement, and is to be applied for the very purpose of paying dividends upon the shares of the company as well as upon the debenture stock. The payment is not, therefore, ultra vires. On the authorities the company is not bound to make up the losses of the fixed capital before paying dividends out of their earnings: *Attree* v. *Hawe* (6); *Ammonia Soda Co.* v. *Chamberlain* (2), where the Court reaffirmed *Lee* v. *Neuchatel Asphalte Co.* (7) There is, therefore, no breach of the company's statutory powers, and if there were the plaintiff has no right to sue.

E. P. Hewitt K.C. in reply.

Cur. adv. vult.

June 21. EVE J., after stating the facts as above set out, continued: The action is based on the allegation that the railway company's undertaking, including any sums coming to it as purchase-moneys for the rails taken by the Government, will be insufficient to provide for the loan capital when the agreement with the Ebbw Vale Company is determined, unless the remaining instalments of the annuity are impounded and retained as capital.

The truth of these allegations is contested, but for the purposes of this judgment the case has been argued on the footing that at the

(1) [1902] 1 Ch. 353.
(2) [1918] 1 Ch. 266.
(3) 16 W. R. 409.
(4) [1903] 2 Ch. 681.
(5) (1860) 2 Giff. 71.
(6) 9 Ch. D. 337.
(7) 41 Ch. D. 1.

present time it is by no means clear that there will be sufficient assets in 1919 to provide in full for the loan capital.

It has been contended on behalf of the defendant company that even so the plaintiff's action cannot succeed, first, because the continued application of the annuity instalments constitutes no breach of the company's statutory powers, and, secondly, that even if such application does involve a transaction ultra vires of the company, the plaintiff cannot sue to restrain it.

Dealing with the first of these contentions, there is no substantial distinction to be drawn between the defendant company, formed under a special Act in which the Companies Clauses Consolidation Act, 1845, is incorporated, and a company registered under the Joint Stock Companies Acts. In both cases the payment of dividends out of capital is illegal, and the question which ultimately emerges for decision in this and most similar cases is whether the fund proposed to be distributed as dividends is capital within the meaning of this restriction, or whether it is surplus revenue untrammelled by any such restriction.

This question is not to be solved by inquiring what an honest or prudent man in receipt of a terminable annuity, and with no other resources, would do, for, although it may be that he would be well advised when the date of determination of the annuity is approaching to retain and invest some part of the annuity, it is obvious that he could not be compelled to do so in an action brought by any person dependent on him, or by his creditors. The analogy relied upon by the plaintiff fails entirely when pressed to its logical conclusion, and the only matter to which I must have regard is the true character of the fund in dispute. What, then, is this fund? It is the rent or price paid each year by the Ebbw Vale Company for the right to use or to retain sole control of the whole undertaking in the construction of which the moneys raised by the loan and share capital of the railway company were expended. On the hypothesis upon which I am proceeding, that this undertaking is now of a less value than the moneys invested in it by way of loan capital alone, is it illegal for the company to distribute the surplus of this annual rent or price remaining after paying the interest on the loan capital and the expenses of management as dividends on the share capital? Or, putting it in another way, is the company bound to retain this

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annual surplus until the equilibrium between the value of the undertaking and the capital sunk in its construction is restored ?

In my opinion the answer to these questions must be in the negative : the payments represent the moneys earned by the investment in which the company's capital has been laid out ; for all practical purposes they are of identically the same character as the interest and dividends received on the stocks and shares in which the company's capital had been invested in *Verner* v. *General and Commercial Investment Trust* (1), and on the authority of that and the other cases on this much debated topic, culminating in the instructive judgments in the Court of Appeal in the recent case of *Ammonia Soda Co.* v. *Chamberlain* (2), I hold that the distribution of the annual surplus is not illegal as being a payment of dividends out of capital.

This conclusion is sufficient to dispose of the action, but, as the plaintiff's right to sue for the relief claimed by his writ was challenged and the point argued, I propose to express the judgment I have formed thereon.

As was stated by Cozens-Hardy L.J. in *Towers* v. *African Tug Co.* (3) an action in respect of or arising out of an ultra vires transaction ought properly to be brought by the company, and, although it has long been established that such an action may be maintained by a shareholder suing on behalf of himself and all other shareholders against the company, the plaintiff in an action so framed must be a person who is really interested. The action cannot be maintained by a common informer, nor by a person who " happens to be within the range of possibility of injury " : see per Lord Chelmsford L.C. in *Ware* v. *Regent's Canal Co.* (4) ; and from this it follows, as the Lord Justice points out a little later on in his judgment, that all personal objections against the individual plaintiff must be gone into and considered before relief can be granted.

Now what is the position of this plaintiff and those on whose behalf he purports to sue ? They are not shareholders, or, if so, are not suing in that capacity ; they are holders of debenture stock created and issued by the defendant company on which all interest has hitherto been duly paid, and which can neither be called in nor

(1) [1894] 2 Ch. 239.
(2) [1918] 1 Ch. 266.
(3) [1904] 1 Ch. 558, 571.
(4) (1858) 3 De G. & J. 212, 228.

paid off. They have no mortgage or charge that can be enforced, and it is not suggested that any event has occurred to justify an application for the appointment of a receiver. In these circumstances, as James L.J. observes in the judgment of the Court of Appeal in *Attree* v. *Hawe* (1), there is no debt except indeed as to the annual interest: there is a right to a perpetual annuity payable out of the concern, but nothing to give the stockholder any right, either at law or in equity, to take possession of a single item of the property of the company in specie.

The action accordingly is not framed, and could not properly be framed, as one to enforce the security, as were those in the two cases upon which the plaintiff's counsel strongly relied in argument—*Wildy* v. *Mid-Hants Ry. Co.* (2) and *In re Liskeard and Caradon Ry. Co.* (3); and it comes, therefore, to this—can a debenture stock holder who has no enforceable charge, who is not a creditor but an annuitant whose annuity is not in arrear, properly be held to be so directly interested in the administration of the affairs of the company liable to pay his annuity as to be a competent plaintiff in such an action as this? I do not think he can. If he can, I do not see why it should not be open to every creditor or potential creditor of the company to commence a similar action. That there may be circumstances in which the Court would interfere at the suit of a debenture stock holder in the plaintiff's position to restrain the company from doing acts to his injury I do not doubt, but where the sole relief claimed is a declaration that a particular application of moneys in which the stockholder has no direct or immediate interest, and upon which he has no specific charge, will be ultra vires of the company, I do not think I ought to hold the plaintiff competent to maintain the action.

In my opinion the defendants are right upon both grounds, and as the parties have agreed to treat the hearing of the motion as the trial, I dismiss the action with costs.

Solicitors: *Stow, Preston & Lyttelton, for Colborne, Coulman & Lawrence, Newport; Cooper & Co., for Davies, Sandars & Swanwick, Chesterfield.*

(1) 9 Ch. D. 337. (2) 16 W. R. 409.
(3) [1903] 2 Ch. 681.

G. M.

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March 8, 13, 27; *May* 10; *June* 18.

In re SODEN AND ALEXANDER'S CONTRACT.

[1917 S. 2482.]

Vendor and Purchaser—Trustee Vendor—Abstract—Non-disclosure of Trust—Notice actual or imputed—Recital—Stamp—Practice of Conveyancers.

An abstract showed the following title:—Conveyance in 1875 under the Court to M., his heirs and assigns. Conveyance in 1896 on sale by M. to W., C., and S., their heirs and assigns. Conveyance in 1899, reciting that the premises were the property of C., S., and R., as joint tenants in equity as well as at law, by W., C., and S. to C., S., and R., their heirs and assigns, to the intent they might hold as joint tenants in equity as well as at law, covenants by W., C., and S. as to their own acts against incumbrances. Conveyance in 1900, reciting that the premises were the property of S., R., M., and P., as joint tenants in equity as well as at law, by C., S., and R. to S., R., M., and P., their heirs and assigns, to the intent they might hold as joint tenants in equity as well as at law, covenant by C., S., and R. against incumbrances. Release in 1906, reciting that the premises were the property of S., R., and P., as joint tenants in equity as well as at law, by M. to S., R., and P., their heirs and assigns, to the intent the premises might be vested in them alone as joint tenants. Release in 1910 (after the Finance (1909–10) Act, 1910), reciting that the premises were the property of S. and R. (the present vendors), as joint tenants in equity as well as at law, by P. "as trustee" to S. and R., their heirs and assigns, to the intent they might hold as joint tenants in equity as well as at law. Each of the four last-mentioned deeds was stamped 10*s*. The purchaser objected that the abstract appeared to give him notice that the vendors were trustees:—

Held, that the deeds did not separately or collectively, nor by the fact that four were stamped 10*s*., disclose a trust in favour of third parties.

Summons under Vendor and Purchaser Act, 1874.

By an agreement of June 22, 1917, between Arthur Herbert Soden Soden and George William Ricketts, the vendors, and Edward Alexander, the purchaser, the vendors agreed to sell and the purchaser to purchase four messuages and premises, Nos. 67, 69, 71, and 73, Highgate Hill, for an estate in fee simple free from incumbrances, the title to commence with an indenture of December 15, 1875, being a conveyance on a sale under an order of the Court.

The abstract showed the title as follows:—

December 15, 1875: conveyance on sale by direction of the

Court to the use of Edward Mackeson, his heirs and assigns for ever.

December 16, 1875: acknowledgments by married women indorsed thereon.

May 20, 1896: declaration by E. Mackeson of free and undisturbed possession of the premises for at least twelve years.

May 22, 1896: conveyance on sale by E. Mackeson to the use of Robert Arthur Whitting, Thomas Somers Vernon Cocks, and Arthur Herbert Soden Soden, their heirs and assigns for ever, in consideration of 2620*l.* (13*l.* 5*s.* stamp.)

March 1, 1899: conveyance, reciting that the hereditaments were the property of T. S. V. Cocks, A. H. S. Soden, and George William Ricketts, "as joint tenants in equity as well as at law," by R. A. Whitting, T. S. V. Cocks, and A. H. S. Soden to the use of T. S. V. Cocks, A. H. S. Soden, and G. W. Ricketts, their heirs and assigns for ever, "to the intent that the same hereditaments and premises may be held and enjoyed by them as joint tenants in equity as well as at law and be transmissible accordingly." Covenants against incumbrances by R. A. Whitting, T. S. V. Cocks, and A. H. S. Soden as to their own acts respectively. (10*s.* stamp.)

November 12, 1900: conveyance, reciting that the hereditaments were the property of A. H. S. Soden, G. W. Ricketts, Hugh Burdett Money Coutts, and Cyril Arthur Pearson, "as joint tenants in equity as well as at law," by T. S. V. Cocks, A. H. S. Soden, and G. W. Ricketts, to the use of A. H. S. Soden, G. W. Ricketts, H. B. M. Coutts, and C. A. Pearson, their heirs and assigns for ever, "to the intent that the same hereditaments and premises may be held and enjoyed by them as joint tenants in equity as well as at law and be transmissible accordingly." Covenant against incumbrances by T. S. V. Cocks, A. H. S. Soden, and G. W. Ricketts. (10*s.* stamp.)

November 28, 1906: release, reciting that the hereditaments were the property of A. H. S. Soden, G. W. Ricketts, and C. A. Pearson, "as joint tenants in equity as well as at law," by H. B. M. Coutts "as trustee," to the use of A. H. S. Soden, G. W. Ricketts, and C. A. Pearson, their heirs and assigns, "to the intent that the same premises may be vested in them alone as joint tenants." (10*s.* stamp.)

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June 30, 1910: release, reciting that the hereditaments were the property of A. H. S. Soden and G. W. Ricketts, "as joint tenants in equity as well as at law," by C. A. Pearson "as trustee," to the use of A. H. S. Soden and G. W. Ricketts (the present vendors), their heirs and assigns, "to the intent that the same hereditaments and premises may be held and enjoyed by them as joint tenants in equity as well as at law and be transmissible accordingly." (10*s.* stamp.)

The purchaser's requisition No. 22 was as follows: "The abstract appears to give the purchaser notice that the vendors are in fact trustees and they must therefore deliver a further abstract showing that they have a sufficient power of sale."

To that the vendors replied: "We do not agree. See clause 7 of contract."

Clause 7 of the contract was as follows: "The vendors shall not be required to enter into any covenants for title except a covenant that they respectively have not incumbered. No objection or requisition shall be made on the ground that in any conveyance of the property (not being a conveyance on a sale) the person or persons conveying entered into no covenants for title except a covenant against incumbrances or was or were expressed to convey as a trustee or as trustees."

Correspondence took place between the parties, and ultimately the vendors took out this summons claiming that the purchaser's requisitions had been sufficiently answered and a good title shown.

H. Terrell K.C. and *E. A. Jennings* for the vendors. The conveyances in 1899 and 1900 contain clear and unambiguous recitals that the parties are entitled to the property as joint tenants in equity as well as at law, with the usual covenants against incumbrances, and the two releases of 1906 and 1910 contain similar clear and unambiguous recitals. A recital of this character negatives any trust in favour of any other person. If the recital is consistent with there being no trusts except for the parties, the purchaser cannot inquire further: *In re Chafer and Randall's Contract.* (1) The mere fact that the releasor purported to release "as trustee," with the usual implied covenant against incum-

(1) [1916] 2 Ch. 8.

brances under s. 7, sub-s. 1 (F), of the Conveyancing Act, 1881, does not import a trust into the transaction. The object of s. 7 was to shorten the forms of conveyancing and save the necessity of setting out covenants in extenso: *In re Ray.* (1) The purchaser has not, by reason of the deeds of 1899, 1900, 1906, and 1910 bearing 10*s.* stamps, notice of any trust for a third person: Conveyancing Act, 1911, s. 13.

Robertson-Macdonald (for *J. A. Hay*, serving with His Majesty's Forces) for the purchaser. The purchaser has notice of a trust for third parties on the face of the abstract and from the fact that, if there is no such trust, the deeds are not duly stamped; and if the releasor under the deed of 1910 was a beneficial owner the purchaser has not got proper covenants for title. First, as to the abstracted deeds. According to the practice of conveyancers, on purchases by trustees the trusts are disclosed in the conveyance: Prideaux's Precedents in Conveyancing, 21st ed. vol. i. pp. 481, n., 503; Key and Elphinstone's Precedents in Conveyancing, 5th ed. vol. i. pp. 256, n., 494; 9th ed. vol. i. pp. 300, n., 573; 10th ed. vol. i. pp. 326, n., 619; Davidson's Precedents and Forms in Conveyancing, vol. ii., pt. 1 (3rd ed. 1864), xxiv., xxv. (Conveyances on Sales); Davidson's Concise Precedents in Conveyancing, 19th ed. pp. 168-171, n.; or the property is conveyed to the trustees upon trust to sell and stand possessed of the proceeds on the trusts declared by the settlement—which does not bring the settlement on the title: Prideaux's Precedents in Conveyancing, 21st ed. vol. i. p. 498. Here the recital that the grantees are entitled "as joint tenants in equity as well as at law" requires explanation. It is not clear and unambiguous, and is not a usual form of recital. *In re Chafer and Randall's Contract* (2) is distinguishable, because there the recital was complete and an unequivocal declaration of trust for the parties named. In each of the releases of 1906 and 1910 the releasor expressly declares that he is a trustee; he releases "as trustee." Those words, importing the implied covenant against incumbrances under s. 7, sub-s. 1 (F), of the Conveyancing Act, 1881, are intended in the section to be a statement of the capacity in which the conveying party actually conveys; they are not a mere meaningless or artificial expression used in order to import a

(1) [1896] 1 Ch. 468. (2) [1916] 2 Ch. 8.

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covenant. If they were, the grantor might as well convey "as mortgagee" or "as personal representative," &c. Sub-s. 2 of s. 7 would be superfluous if covenants for title could be implied by a person who is not a beneficial owner being expressed to convey "as beneficial owner." See also s. 26, sub-s. 2, and s. 27, sub-s. 3, which deal with other implied covenants. The stamps on the deeds point to a trust for third persons: Finance (1909–10) Act, 1910, s. 74. Prior to the Conveyancing Act, 1911, a stamp of 10*s.* on the transfer of a mortgage, if the debt exceeded 2000*l.*, was understood to give notice of a trust: Wolstenholme's Conveyancing and Settled Land Acts, 10th ed. p. 133, n., referring to the late Mr. John Dixon's opinion set out in 49 *Solicitors' Journal* at p. 317. The purchaser is entitled to have all the deeds properly stamped.

H. Terrell K.C. in reply. This is not a case to which s. 4 of the Finance (1909–10) Act, 1910, applies. That deals only with conveyance on sale. This is not that. There is a recital here that the vendors are entitled in equity, and that is sufficient: Williams' Law of Vendor and Purchaser, 2nd ed. vol. i. pp. 238–240. This is a clearer case than *In re Chafer and Randall's Contract.* (1) There is nothing in the objection on the ground of insufficiency of stamping, if the adjudication of the Commissioners is obtained.

Cur. adv. vult.

June 18. YOUNGER J. The question which emerges upon this vendor's summons is whether the purchaser has received notice, or ought to have notice imputed to him, that the property the subject-matter of sale is, in the hands of the vendors, affected by some trust actually in existence, although the nature of it is not disclosed to the purchaser on the abstract or otherwise. Upon the original hearing of the summons the argument on both sides was confined solely to the question whether or not notice of the trust, actual or imputed, was given to the purchaser by the frame and stamping of some of the abstracted deeds. Certain correspondence, however, exhibited to the vendors' evidence, although not referred to at the original hearing, appeared on perusal to raise the serious question whether notice of the existence of the trust in question had not thereby, apart altogether from the abstract, been given to the purchaser.

(1) [1916] 2 Ch. 8

The summons was accordingly restored to the paper for further argument upon this point; and it now becomes my duty to express my conclusions upon the whole matter, dealing with the two aspects of the case in the order in which they were presented to the Court.

It is strongly suggested by the purchaser that no less than four of the abstracted deeds show to him that there is in existence such a trust as I have described, and by his 22nd requisition he required the vendors to deliver a further abstract showing that they had a sufficient power of sale. This the vendors refused to do: hence this summons. Now I shall have to deal in detail with these deeds; but I may say at once that, taking them as a whole, they do point with such probability to the existence in the background of a trust that, at the risk of encroaching upon the obvious, it will be convenient, before examining their provisions in detail, to recall the principles upon which that examination must for present purposes proceed. They will be found conveniently restated in *In re Chafer and Randall's Contract* (1) to the effect following: When lands are vested in trustees, it being frequently desired to keep notice of trusts off the title, the recognized practice of conveyancers, not confined to a case of a mortgage held by trustees, is, on the occasion of the property being transferred on an appointment of new trustees, to frame recitals in the deed accounting for the transfer while not disclosing the trust. When recitals of this kind are met with they are accepted by a purchaser without inquiry; and none the less are they so accepted although conveyancers are well aware for what purpose such statements are in all probability made. Conveyancers, nevertheless, do not seek to go behind the statements; they abstain from inquiries which, if answered, would oust their client from the position of a purchaser for value obtaining the legal estate in good faith without notice of any trust; they accept the statements, in Sargant J.'s words in *In re Chafer and Randall's Contract* (2), "at their face value."

Now there is a presumption that all things have been rightly done; and this attitude of conveyancers has its ultimate justification in that presumption. But it may be doubted whether, even so, the practice of accepting without inquiry statements, the ulterior purpose of which is all but self-evident, would have

(1) [1916] 2 Ch. 8. (2) [1916] 2 Ch. 25.

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continued so long, or been extended so far as it has, had it not always been recognized that that purpose embodied a "highly desirable and perfectly honest object" of attainment: see per Lord Cozens-Hardy M.R. (1) And certain it is that, unless in some way notice of trusts can be effectively kept off the title of trustee vendors, sales of trust property in all but the simplest cases would be seriously, if not fatally, prejudiced. Purchasers will not lay out their money in acquiring property the security of their title to which may depend upon an exhaustive investigation into the execution of trusts, which can rarely be complete and must always seem burdensome. Further, it can hardly be doubted that the proper and beneficial disposition of trust estates by trustees, who, either mediately or immediately, have had confidence reposed in them by the author of the trust or the Court, should not be hampered by the burden of answering elaborate domestic questions, even if the conventions necessary in the majority of cases to obviate them should destroy, in the comparatively rare instances of abuse, the claim of cestuis que trust to follow the trust property into the hands of the purchaser. It is better this claim should be lost, and the cestuis que trust in these cases be left to their remedy against their trustees personally, than that the value, for purposes of realization of trust property, should in the mass be generally prejudiced. Whether or not the attitude of the Courts has been influenced by such considerations as these, the tendency of later decisions has been in the direction of extending rather than of narrowing the range of recitals which must be accepted—*In re Harman and Uxbridge and Rickmansworth Ry. Co.* (2) is a notable instance; and to-day the question on the abstract raised by this summons is not to be settled in favour of the purchaser by any mere suspicion, however strongly derived from its perusal, that even the vendors themselves hold the property under a trust which they will not disclose. Unless there is something appearing on the abstract which necessarily shows that the vendors here are in fact trustees of the property for some outstanding person or persons, the purchaser is on this matter neither concerned nor entitled to make inquiry; and the sole question which I have to consider is whether "at their face value" the statements in the

(1) [1916] 2 Ch. 19. (2) (1883) 24 Ch. D. 720.

different deeds relied upon for the purpose do disclose the existence of such a trust.

The property in question consists of four messuages at Highgate Hill; and the contract of sale is dated June 22, 1917. By clause 6 the vendors' title is to commence with a conveyance on a sale under the direction of the Court dated December 15, 1875. The purchaser under that deed was one Edward Mackeson. By a conveyance of May 22, 1896, he conveyed the property to Robert Arthur Whitting, Thomas Somers Vernon Cocks, and Arthur Herbert Soden Soden, to hold the premises "unto and to the use of the purchasers, their heirs and assigns for ever." The purchase-money of 2620*l.* payable under this deed seems to have been paid by the purchasers jointly. There is no circumstance appearing on it to displace the joint tenancy even in equity; and no question so far arises. The four deeds to which reference has already been made as raising the question are subsequent in date.

And the first of them is a conveyance of March 1, 1899, by Whitting, Cocks, and Soden to Cocks, Soden, and Ricketts. This deed contains a recital that the premises were then the property of Cocks, Soden, and Ricketts as joint tenants in equity as well as at law, and that Whitting, Cocks, and Soden had, at the request of the former, agreed to execute to them such conveyance as was thereinafter contained. The conveyance is to Cocks, Soden, and Ricketts in fee simple, "to the intent that the same hereditaments and premises may be held and enjoyed by them as joint tenants in equity as well as at law and be transmissible accordingly." And the conveying parties covenant against incumbrances. Now the purchaser contends that the recital that Cocks, Soden, and Ricketts were then entitled at law is contrary to the fact, unless there be in existence some other deed making them joint tenants at law, which has neither been abstracted nor produced; and he calls for that deed. The answer to this contention, following the principles above indicated, I think, is that according to the well-known rule the abstract must be taken as between the vendors and the purchaser to contain all the deeds which affect the legal estate in the property; and the recital must be construed with that rule in view. Now I think that, while, so far as the words "in equity as well as at law" are concerned, the recital is really directed to a negation

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of a tenancy in common, whether the doctrines of equity or those of law are taken into account, the gist of the recital as a whole clearly is that the grantees are the real owners of the property, although upon the face of the deeds the legal estate is vested in the original purchasers, Whitting and others. Consequently, these are trustees for the grantees, or at all events Whitting, who is not one of them, is a trustee for the grantees. Accordingly, the recital proceeds to say that the original purchasers have at the request of the grantees agreed to execute the conveyances ; and the conveyance follows on that footing. This view justifies the absence of full covenants for title and the presence only of a covenant against incumbrances, and this explanation of the deed as a whole also shows that " at its face value " it can give rise to no proper inference of a trust in favour of third parties on the part either of the grantors or the grantees.

The second deed is one of November 12, 1900, a conveyance by Cocks, Soden, and Ricketts to Soden, Ricketts, Coutts, and Pearson. The recital and operative part of this deed are analogous to those in the deed of 1899. If that deed was innocent, so, subject only to one matter to be alluded to later, must be the deed of 1900.

The third deed is one of November 28, 1906, a conveyance by Coutts to Soden, Ricketts, and Pearson. In this deed, inasmuch as no new grantee was introduced and the operation required was a release by one joint tenant to two others, the deed is properly framed as a release by Coutts, one of the four then owners, to the three whose property the hereditaments were declared to be. The interest of the releasor was on that footing held by him in trust for the other three parties, although for no other persons ; and therefore no exception is to be taken to the release by him being expressed to be " as trustee."

The fourth deed is one of June 30, 1910, a conveyance by Pearson to Soden and Ricketts, the present vendors. To this deed precisely the same considerations apply as to the deed of 1906. The result, therefore, is that no one of these deeds taken by itself has the effect of disclosing a trust in favour of third parties. Is, then, the purchaser's position on this summons improved by the fact that the cumulative effect of these deeds is to strengthen the inference that the deed of 1899 was a transfer of the property on the appointment of Ricketts as a new trustee in the place of Whitting,

who had retired; that of 1900 a transfer on the appointment of Coutts and Pearson as new trustees in place of Cocks, who had retired; that of 1906 a release of the property to the continuing trustees on the retirement of Coutts; and that of 1910 a like release on the retirement of Pearson from the trust? I think not. The principle of the authorized conveyancing practice under consideration requires me to hold that, as nothing in any one of the deeds justifies the purchaser's contention, the total effect of the four deeds is no greater.

But all the four deeds are stamped with a 10s. stamp only; and it was contended on behalf of the purchaser that that circumstance raised an inference that there was a trust, and that the grantees were trustees. The argument has little, if any, force with reference to the first three deeds. They were all dated prior to the Finance (1909–10) Act, 1910; they were none of them either a conveyance on sale or a mortgage; and, as before that Act no greater stamp than 10*s.* was required on a conveyance of land unless the deed was either a conveyance on sale or a mortgage, the 10*s.* stamp was sufficient, whether the deed was executed on a change in a trust or not. But the argument was really rested on the deed of June 30, 1910, to which the Finance (1909–10) Act, 1910, s. 74, is applicable. Sub-sect. 6 of that section provides that a conveyance under which no beneficial interest passes in the property, or which is made to a beneficiary by a trustee, whether expressed or implied, is not to be charged with duty under the section. Now if that deed of 1910 be, as on its face it appears to be, a conveyance from the trustee Pearson to those whom he has acknowledged to be his beneficiaries, it is exempt from duty by virtue of the sub-section; and the 10*s.* stamp can give no notice of the existence of a trust for third persons. And any difficulty presented by sub-s. 2 of the section, to the effect that no conveyance chargeable thereunder is to be deemed duly stamped unless the Commissioners have expressed their opinion thereon, is, in the present case, got over by the vendors' willingness to have the deed adjudicated.

It remains, however, to be considered whether the adjudication of itself will not have the effect of giving notice of a trust. A similar question used to arise before the Conveyancing Act, 1911, where transfers of mortgage not for valuable consideration were stamped

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with only a 10*s.* stamp, either with or without adjudication. The view used to be that, unless the transfer was upon the appointment of new trustees, the stamp must be ad valorem of 6*d.* per 100*l.* upon the amount transferred. Consequently, any transfer of a mortgage debt of more than 2000*l.* stamped only 10*s.* was either insufficiently stamped or gave notice of the fact of its being a trust; and, if it was adjudicated as being sufficiently stamped, the latter alternative was considered to be irrefutable. That view was ultimately somewhat modified as the result of the published opinion of an eminent conveyancer, now deceased; and it is now got over by s. 13 of the Conveyancing Act, 1911, which provides that "a purchaser shall not, by reason only of the transfer bearing a 10*s.* stamp, whether adjudicated or not, be deemed to have or to have had notice of any trust, or that the transfer was made for effectuating the appointment of a new trustee." In the present case, however, any difficulty presented by the fact of adjudication does not really arise at all, because, if the deed of 1910 is to be taken as of its face value, the 10*s.* stamp is the proper stamp to affix; and adjudication does not suggest that the statement on the face of the deed cannot be relied on.

On the whole, the result, in my opinion, is that no notice of a trust is in this case given by the abstracted deeds.

[His Lordship then considered the correspondence and matters outside the abstract, and held that by them the purchaser was put on inquiry and entitled to have the requisition answered.]

Solicitors: *Robinson, Wilkins & Thacker*; *Hurd, Crook & Jones.*

A. L.

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May 30, 31.

In re DOHERTY-WATERHOUSE. MUSGRAVE *v.* DE CHAIR.

[1918 D. 246.]

Will—Specific Bequest—Personal Property described in a general manner"—General Testamentary Power—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27.

Testatrix bequeathed all her stock in a certain undertaking to a named legatee and bequeathed all her real estate and all the residue of her personal estate, including any property over which she might have an absolute power of appointment, to trustees upon trusts therein declared. At the dates of her will and death the testatrix was the absolute owner of the sum of 111*l.* 3*s.* 5*d.* of the stock in question and had a general testamentary power of appointment over the sum of 550*l.* of the same stock:—

Held, that the gift was a "bequest of personal property described in a general manner" within the meaning of s. 27 of the Wills Act, 1837, and operated as an execution of the general power over the sum of 550*l.* stock.

Held, also, that there was no "contrary intention" appearing by the will within the meaning of the same section.

ADJOURNED SUMMONS.

Catherine Grace Doherty-Waterhouse, who died on October 27, 1916, by her will dated November 4, 1913, appointed executors and trustees, and by clause 3 she exercised a certain special power of appointment given to her by the will of her late father; and by clauses 4 and 5 bequeathed certain pecuniary legacies. By clause 7 the testatrix bequeathed the sum of 100*l.* and "also all my shares in the Halifax Corporation New Market consolidated stock" to Sir Dudley de Chair, to be dealt with by him (without imposing any trust or obligation on him to that effect) in such manner for the benefit of two persons therein named as he should in his uncontrolled discretion think best. By clause 8 the testatrix devised and bequeathed all her real estate and "all the residue of my personal estate including any property over which I may have at the time of my death an absolute power of appointment" unto her trustees upon trusts for sale and conversion, and to hold the proceeds upon the trusts therein declared.

At the date of her will and death the testatrix was entitled to a

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sum of 111*l.* 3*s.* 5*d.* Halifax New Market consolidated stock which was registered in her name. There was also a sum of 550*l.* like stock standing in the names of trustees settled by the will of Elizabeth Bayfield, an aunt of the testatrix, upon trust to pay the income to the testatrix during her life, and after her death upon such trusts as the testatrix should by will or codicil appoint.

This was an originating summons raising the question whether the sum of 550*l.* stock was included in the specific bequest to Sir Dudley de Chair, or whether it passed under the residuary bequest contained in the will.

Stafford Crossman for the trustees.

Bryan Farrer for the specific legatee. There are two questions —first, whether the words "all my shares" in the stock in question are apt to execute the general power; and, secondly, if so, whether there is a "contrary intention" appearing in the will. As to the first point, the fact that the testatrix had some stock to which she was absolutely entitled does not affect the execution of the general power over the specifically described stock. The 550*l.* stock is "personal property described in a general manner" within the meaning of s. 27 (1): *Hawthorn* v. *Shedden* (2); *Shelford* v. *Acland* (3); *Hurlstone* v. *Ashton* (4); *In re Wilkinson* (5); *Turner* v. *Turner* (6); *In re Jacob* (7), where Parker J. points out that the effect of s. 27 of the Wills Act is intended to abolish the old distinction between property and power so far as a general power is concerned. Secondly, there is no "contrary intention" appearing on the will by reason of the inclusion in her residue of any property over which the testatrix might have any absolute power of appointment. Those words refer to the residue other than the specific

(1) The Wills Act, 1837, s. 27: "A general devise . . . . and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

(2) (1856) 3 Sm. & Giff. 293.

(3) (1856) 23 Beav. 10, 14.

(4) (1865) 11 Jur. (N.S.) 725.

(5) (1869) L. R. 4 Ch. 587.

(6) (1852) 21 L. J. (Ch.) 843.

(7) [1907] 1 Ch. 445.

sum of 550*l.* stock already appointed under s. 27: *Scriven v. Sandom.* (1)

D. D. Robertson for the residuary legatees. The power of appointment over the sum of 550*l.* stock was not exercised by the specific bequest. The specific bequest comprised only the sum of 111*l.* 3*s.* 5*d.* which was the testatrix's own property. The testatrix knew the proper way to execute a power of appointment. The sum of 550*l.* stock is not "property described in a general manner." It is specifically and not generally described: *In re Greaves' Settlement Trusts.* (2) There is no authority for giving such an extended operation to s. 27 as is here contended for. Secondly, there is a sufficient "contrary intention" appearing on this will. The express intention manifested in the residuary bequest should prevail where the specific bequest can be satisfied out of the testatrix's own property.

SARGANT J. referred to the material clauses of the will and the sum of stock on which the question arose, and continued: The questions which I have to decide are, first, whether the bequest of "all my shares in Halifax Corporation New Market consolidated stock" is in itself effectual to carry to the legatee the 550*l.* stock by force of s. 27 of the Wills Act; and, secondly, whether a "contrary intention" appears in the will by reason of the express inclusion in the gift of the residuary estate of any property over which at the time of her death the testatrix might have an absolute power of appointment.

As regards the first point, the argument of counsel for the residuary legatees is a curious one, namely, that the terms of the bequest of the stock are so specific that they cannot be said to pass "property described in a general manner."

It would indeed be odd if the subject-matter of a gift were too specifically described to be capable of passing; and to give such an effect to s. 27 of the Wills Act would in my judgment be to invert the operation of the section, which is aimed at making a gift effective not *because of* generality of description but *notwithstanding* generality of description. An absolutely specific gift of property subject to a power, whether general or limited, was always sufficient

(1) (1862) 2 J. & H. 743. (2) (1883) 23 Ch. D. 313.

SARGANT J. to exercise the power. It was when the description was sufficiently general to be also capable of describing the testator's own property that a difficulty arose, because then the words of gift could be satisfied without imputing to the testator an intention to exercise the power. The section cured this by altering with regard to general powers the prima facie presumption of intention, and by putting in this respect ownership and general power on the same footing. I cannot think that the section left any hiatus between an absolutely specific gift of property subject to a general power, which is sufficient to pass that property apart from the section, and such a more general description of the property as might but for the section be satisfied independently of the property subject to the power.

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Here, though the gift is specific as compared with a gift of "all my stocks and shares" or of "all my stock in municipal corporations," it is more general than a gift of "my present holding of 550*l.* stock in the Halifax Corporation New Market consolidated stock." It is admittedly sufficiently general to include the 111*l.* 3*s.* 5*d.* stock then possessed by the testatrix or any other stock of the same description which she might thereafter acquire in the ordinary way. And it is therefore, in my judgment, a "bequest of personal property described in a general manner" within both the language and the intention of the section.

The second point taken by counsel for the residuary legatees is that there is a "contrary intention" shown by the testatrix within the meaning of s. 27. In the case of *Scriven* v. *Sandom* (1) Wood V.-C. said: "There is no contrary intention within the meaning of the statute, unless you find something in the will inconsistent with the view that the general devise was meant as an execution of the power." In the present case I can see no such inconsistency, or even any doubt. By the additional words the testatrix is, I think, only intending to make it clear that in disposing of her real estate and the residue of her personal estate she is dealing with that to which she is absolutely entitled or over which she has any general power of appointment, but I see nothing which would limit or restrict the bequest of the stock in question. That express inclusion of any property over which the testatrix might have a power, following, as it does, immediately upon the gift of real and

(1) 2 J. & H. 743, 74

residuary personal estate, has reference, in my opinion, only to her real estate and the "residue" of her personal estate, and bears no reference to the antecedent bequest of the stock in question. In short, I can see no reason, from the language used, for extending the gift to all property over which she might have a power of appointment so as to result in cutting down the effect of the language used in the antecedent bequest of the stock in regard to which s. 27 of the Wills Act would otherwise operate to pass the stock subject to the power.

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Solicitors: *Thorold, Brodie & Bonham Carter; Martineau & Reid.*

A. C.

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[1918 H. 133.]

Mortgage—Priority—Notice—Chose in Action—Declaration of Trust—Equitable Reversionary Interest—Trustee and Cestui que Trust—Solicitor and Client—Breach of Trust—Conflicting Equities.

On October 20, 1897, a firm of solicitors executed a declaration of trust in favour of two of their clients in respect of a mortgage debt of 4000*l.* secured by a deed of September 29, 1897, upon a reversionary interest in a share of personalty settled by a will. The 4000*l.* was money belonging to the clients, but was stated in the deed to have been advanced by the solicitors on a joint account. Notice of this mortgage was given by the solicitors to the trustees of the will, but no notice was given to them by the beneficiaries of their interest under the declaration of trust. In breach of trust the solicitors purported to assign the same reversionary interest to other mortgagees represented by the plaintiffs. In an action by the plaintiffs claiming priority for their charge, dated January 14, 1907, on the ground that they had given notice of it to the trustees of the will in July, 1917, and had also obtained from the solicitors possession of the title deeds to the property:—

Held, that the title of the cestui que trust under the declaration of trust did not require to be perfected by notice, and that the defendant, as beneficiary under that declaration, was entitled to priority over the subsequent mortgagees who had given notice.

The principle on which the rule in *Dearle* v. *Hall* (1828) 3 Russ. 1

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was founded ought not to be extended, and had no application to a beneficiary who had no right of possession himself, and could only assert his claim to receive through his trustee.

ACTION WITH WITNESSES.

The plaintiffs in this action were R. Middelton Hill and A. Barker Basset, the executors and trustees of the will of Mrs. L. A. Gwyn ; and the defendant, Mrs. Mary Jane Peters, was executrix and residuary legatee of her husband, P. H. Peters. The plaintiffs and the defendant respectively claimed to be entitled to a charge upon the same premises, and the question of priority arose.

The facts were not in dispute at the trial, and are taken from the judgment of the Court.

On September 29, 1897, Howell Powell Edwards and John Scott Heron, partners in the late firm of Edwards & Heron, solicitors, purported to advance out of moneys belonging to them on a joint account the sum of 4000*l.* to one Sydney Gotto on the security of his one undivided fifth share in the residuary personal estate of his father expectant on the death of his mother, then and still living. Notice of this mortgage was given to the trustees of the father's will on October 13, 1897. At or about the same time Edwards & Heron were about to complete a sale of property belonging to other clients, Philip Hall Peters (since deceased) and his wife, in respect of which a sum of 4800*l.* would be receivable by them on behalf of Mr. and Mrs. Peters. On October 18, 1897, Edwards wrote on behalf of his firm to Mr. Peters : "I enclose you a note of the securities which we have taken up for 4000*l.* as it would not wait, and which you can have if you like, until you are ready for the money to invest elsewhere." No document was identified as the inclosure, nor was any copy of Mr. Peters' reply to that letter produced ; but its purport appeared from a receipt dated October 20, 1897, wherein the firm acknowledged having received from Philip H. Peters and wife the sum of 4800*l.* "for advance to Sydney Gotto 4000*l.* at two months' notice, and to repay trustees 800*l.*" On the same day Edwards & Heron executed a declaration of trust declaring themselves trustees of the Gotto mortgage debt and interest, and the security created by the mortgage of September 29, for Mr. and Mrs. Peters as joint tenants, and covenanted at any time, on request, to repay the 4000*l.* on two months' notice. On January 14, 1907,

Edwards & Heron, through the agency and with the assistance of one Ernest Tompkins, raised the sum of 4000*l.* from another client, Mrs. L. A. Gwyn, a widow, on the security of Sydney Gotto's one-fifth, concealing from the mortgagee the existence of the declaration of trust in favour of Mr. and Mrs. Peters, and not disclosing to her the fact that Tompkins had no interest in the property, although posing as the mortgagor, and that his apparent title thereto was founded on a fictitious sale and assignment to one Ponsford, which sale and resale were alleged in paragraphs 3, 4, and 5 of the statement of claim. In February, 1907, Edwards & Heron paid off 2000*l.* to Mr. and Mrs. Peters. Down to that date they paid interest on the 4000*l.* to Mr. and Mrs. Peters, and thereafter, down to the death of Edwards in January, 1917, they paid interest on the 2000*l.* to Mr. Peters, and after his death in February, 1911, to Mrs. Peters. Mrs. Gwyn died in August, 1911. Edwards & Heron paid interest on the 4000*l.* advanced by her to Mrs. Gwyn during her lifetime and, after her death, to the plaintiffs, as her executors, down to the death of Edwards. In 1912 the plaintiffs obtained possession of the mortgage deed of September 29, 1897, of a fictitious and incomplete assurance to Tompkins of November 9, 1906, and of the mortgage to their testatrix. On July 6, 1917, they gave notice of the mortgage to their testatrix to the surviving trustee of Mr. Gotto's will, and in December, 1917, they learnt for the first time of the existence of the declaration of trust in favour of Mr. and Mrs. Peters.

In these circumstances the plaintiffs brought this action against Mrs. Peters, claiming a declaration of priority for the 4000*l.* advance made by their testatrix over the defendant's outstanding 2000*l.* The claim in the writ and statement of claim was based upon the assumption that the sales to and by Ponsford were genuine and real transactions, but, this assumption having been shown to be fallacious, the plaintiffs by their reply alleged that Mr. and Mrs. Peters had enabled Edwards & Heron to deal with the security of September 29, 1917, as absolute owners, (1.) by their conduct in taking a declaration of trust as security for the advance of 4000*l.* instead of an assignment of the mortgage of September 29, 1897; (2.) in permitting Edwards & Heron to retain possession of the mortgage deed; (3.) in omitting to have any notice of the declaration of trust

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indorsed on the mortgage deed; and (4.) in omitting to give any notice of the declaration of trust or of their interest in the mortgage security to Gotto's trustees.

E. P. Hewitt K.C. and *A. Adams* for the plaintiffs. The rule in *Dearle* v. *Hall* (1) applies in this case, and notice of the title of the defendant to this mortgage not having been given to the trustee of Gotto's will, her security is postponed to that of the plaintiffs, who showed greater diligence and did give notice. The title deeds are also in our possession. Where there are conflicting equities, these are elements to be considered. Further, this transaction with Mr. and Mrs. Peters was an assignment of an equitable interest, and notice of such an assignment must be given, or else omitted at the risk of the mortgagee: *Meux* v. *Bell.* (2) There is no case which has expressly decided that the rule in *Dearle* v. *Hall* (1) is applicable where the sub-assignment takes the form of a declaration of trust for another person. The nearest case to it is *In re Richards.* (3)

Clayton K.C. and *F. Whinney* for the defendant. *Dearle* v. *Hall* (1) is inapplicable to a case where the relationship of trustee and cestui que trust has been established. There was no assignment of the equitable interest here. Nor has there been any negligence on the part of the defendant, either in allowing the deed to be in the custody of the trustee, or in not having an indorsement placed on it, or in omitting to give notice of the declaration of trust to Gotto's trustee. A beneficiary under a trust deed does not require to perfect his title by any such notice. In order to take away a pre-existing equitable title created by a declaration of trust, such as exists here, a strong case is required: *Cory* v. *Eyre* (4); *Shropshire Union Railways and Canal Co.* v. *Reg.* (5); *Bradley* v. *Riches.* (6) According to the decisions in *In re Vernon, Ewens & Co.* (7) and *Carritt* v. *Real and Personal Advance Co.* (8), there has been no negligence here on the grounds suggested in the reply. The cestui que trust was not entitled to possession of the property; that was in the trustees of Gotto's will. Where there has been an assignment

(1) 3 Russ. 1.
(2) (1841) 1 Hare, 73.
(3) (1890) 45 Ch. D. 589.
(4) (1863) 1 D. J. & S. 149, 167.
(5) (1875) L. R. 7 H. L. 496.
(6) (1878) 9 Ch. D. 189.
(7) (1886) 32 Ch. D. 165; 33 Ch. D. 402.
(8) (1889) 42 Ch. D. 263.

the assignee has to give notice in order to establish his priority, but not in the case of a declaration of trust: *In re Spackman.* (1) In the present case there was no assignment, and to require a cestui que trust to give notice of a chose in action would upset the whole principle of trusts: *Ryall* v. *Rowles.* (2) The doctrine of notice is fully discussed in *Ward* v. *Duncombe* (3), and Lord Macnaghten in that case said that the rule of *Dearle* v. *Hall* (4), which must be treated as settled law, ought not to be extended to cases which did not come within it. The effect of notice is to establish privity, which is inapplicable to the case of a cestui que trust: *Société Générale de Paris* v. *Walker.* (5)

E. P. Hewitt K.C. in reply, on the question of whether the transaction with Mr. and Mrs. Peters was in effect an assignment, referred to *Cook* v. *Black.* (6)

EVE J., after stating the facts substantially as set out above, continued: By their reply the plaintiffs have raised an alternative case, and rely upon four grounds as sufficient to displace the priority which the relative dates of the declaration of trust in favour of Mr. and Mrs. Peters and the mortgage to Mrs. Gwyn would confer upon the defendant. The first ground is that Mr. and Mrs. Peters, being absolute owners of the 4000*l.*, ought not to have constituted Edwards & Heron trustees for them of the security, but ought to have taken it in their own names either originally or by assignment and transfer from Edwards & Heron. The second ground is that, having constituted Edwards & Heron trustees of the security, they ought not to have left the security in the possession of the trustees. The third is that, having so left it, they ought to have insisted that there should be indorsed upon the mortgage deed notice of the declaration of trust, or of their interest in the moneys thereby secured. There is another and fourth ground which I will deal with separately, but, so far as the three grounds which I have enumerated are concerned, I do not consider that there is any substance in them.

There is nothing to prevent an individual, if he is so minded, from vesting any item of his property in another person as a trustee,

(1) (1890) 24 Q. B. D. 728.
(2) (1749) 1 Ves. Sen. 348.
(3) [1893] A. C. 369, 394.
(4) 3 Russ. 1.
(5) (1885) 11 App. Cas. 20.
(6) (1842) 1 Hare, 390.

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and if he so does, the trustee is the proper custodian of the documents of title and other indicia of ownership. Moreover, the settlor is justified in adopting an attitude consistent with a belief on his part in the honesty of the individual whom he has appointed trustee. He is entitled to act on the footing that he has selected an honest man for the position, and not the less so because the person selected happens to be his own solicitor. Further, it is contrary to well-recognized practice to introduce into the transaction any notice of the existence of the trust by an indorsement on the title deeds or otherwise. If authority is needed for these several propositions, it is to be found in *Cory* v. *Eyre* (1), *In re Richards* (2), *Shropshire Union Railways and Canal Co.* v. *Reg.* (3), *Bradley* v. *Riches* (4), and *Carritt* v. *Real and Personal Advance Co.* (5)

The suggestion as to the propriety of indorsing notice on the security in the hands of the trustee was put forward in more than one of these cases, particularly in *Bradley* v. *Riches* (4), and in this connection it is not altogether immaterial to point out that in the mortgage deed of September 29 the mortgagees are recited as making the advance out of moneys belonging to them on a joint account, a statement calculated to some extent to raise a presumption that it was raised out of trust moneys, seeing that there is in fact no reference in the document to the moneys constituting any partnership investment. It may be, therefore, that the plaintiffs' testatrix, had she investigated the matter by independent solicitors, would have been put on inquiry and might then have come to learn the sources from which the moneys were obtained to make the advance. But the matter is not worth pursuing, as I am satisfied that there was no negligence on the part of Mr. and Mrs. Peters in forbearing to have the mortgage deed indorsed, as it is suggested they ought to have done.

The fourth ground upon which the plaintiffs rely is that Mr. and Mrs. Peters ought to have given notice of the declaration of trust, or of their interest in the mortgage security, to the trustees of the will of the elder Mr. Gotto. That ground is based upon the assertion, first, that the transaction between Edwards & Heron and

(1) 1 D. J. & S. 149, 165.
(2) 45 Ch. D. 589, 594, 595.
(3) L. R. 7 H. L. 496, 507, 508.
(4) 9 Ch. D. 189.
(5) 42 Ch. D. 263, 269, 270.

Mr. and Mrs. Peters was in fact an equitable assignment, and not the creation of a trust, and, secondly, upon this wider ground, that, even if the true character of the transaction was the creation of a trust, the title of the defendant and her husband as cestuis que trust under the declaration could only be perfected, according to the rule in *Dearle* v. *Hall* (1), by notice to the trustees of the will of the elder Mr. Gotto. No such notice having been given, the plaintiffs claim that their security, of which notice was given on July 6, 1917, although posterior in date, is entitled to priority over the defendant's. In my opinion, the declaration of trust was not an assignment or transfer, but the creation of the relationship of trustee and cestui que trust as between Edwards & Heron and Mr. and Mrs. Peters. I see nothing in the deed, or in any of the documents produced, to warrant me in treating the transaction as one of any other character, or having any other effect. The proposition that the beneficiaries' title under the declaration required perfecting by notice is a very startling one, for which no authority has been cited, and which, as Mr. Adams frankly admitted, leads to this result—that whenever the trustees hold a chose in action of this nature as part of the trust estate each of the beneficiaries must give notice of his beneficial interest therein, or run the risk of being deprived thereof by some fraudulent transaction between his trustee and an assignee who does give notice. I cannot see any reason whatever for so extending the doctrine of *Dearle* v. *Hall.* (1) I respectfully indorse the observations of Lord Macnaghten in *Ward* v. *Duncombe* (2) as to the undesirability of doing anything to extend that doctrine to cases which are not already covered by it. The principle on which the rule in *Dearle* v. *Hall* (1) is founded, which regards the giving of notice by the assignee as the nearest approach to the taking of possession, has no application, in my opinion, to the beneficiary who has no right to possession himself, and who can only assert his claim to receive through his trustee.

I confess I could have followed a suggestion that Mr. and Mrs. Peters ought possibly to have given notice to Sydney Gotto, the mortgagor; but this naturally has not been advanced, as the plaintiffs themselves have not given any such notice, and, even had they done so, it would not, in my opinion, have availed to give

(1) 3 Russ. 1. (2) [1893] A. C. 369.

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priority to their subsequent security. I do not think there is any more substance in the point founded on *Dearle* v. *Hall* (1) than in the other three points advanced in the reply.

The position, therefore, can be summed up shortly thus: Edwards & Heron, trustees for the defendant of an equitable interest in personalty, in breach of trust, in fraud of their cestuis que trust and for their own purposes, without disclosing the existence of the trust, purported to assign the interest by way of mortgage to the testatrix, and afterwards, in further breach of trust, handed over to her executors the instrument creating the interest. In so doing they have not displaced the defendant's priority: see *Cory* v. *Eyre* (2), already referred to, and *In re Vernon, Ewens & Co.* (3) The defendant has not done, or omitted to do, anything to forfeit that priority, and the bona fides of the testatrix, which is in no way impugned, does not avail to place her later equity in a superior position to the earlier one of the defendant.

The result is that the action fails and must be dismissed with costs. The defendant is entitled on her counter-claim to a declaration of priority and the delivery up to her of the mortgage of September 29, 1897, and the plaintiffs must pay the costs of the counter-claim.

Solicitors: *Wrentmore & Son, for Waldron & Sons, Cardiff*
Emmet & Co.

(1) 3 Russ. 1. (2) 1 D. J. & S. 149.
(3) 32 Ch. D. 165; 33 Ch. D. 402.

G. M.

BIRN BROTHERS, LIMITED *v.* KEENE & CO., LIMITED.

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April 30; *May* 1, 7.

[1916 B. 2626.]

Copyright—Infringement—Civil Remedies—Infringing Copies and Plates —Detinue—Conversion—Concurrent Remedies—Action for Damages —Form of Inquiry—Copyright Act, 1911 (1 *& 2 Geo. 5, c.* 46), *ss.* 6, 7.

The rights conferred upon the owner of copyright by ss. 6 and 7 of the Copyright Act, 1911, are based on different grounds. Under s. 6 he has, in cases of infringement, the usual civil remedies available where a similar right of property is infringed, and can recover damages for the loss sustained by the infringement or, if he prefers, payment of the profits resulting from the piracy. Under s. 7 he has an action of detinue in respect of unsold infringing copies and plates, which by virtue of the section are deemed to be his property, and an action for conversion in respect of such infringing copies and plates as have been sold. But under a judgment directing merely an inquiry as to the damages sustained by reason of the infringement of copyright, the damages to be assessed are confined to damages for infringement, including damages occasioned by reason of the defendant having infringed the copyright by selling copies; they do not include damages for the conversion of infringing copies and plates.

Quaere whether in assessing damages for conversion under s. 7 the cost which the plaintiff would have incurred in himself producing the infringing copies should be deducted.

Adjourned Summons.

The plaintiffs were wholesale fine art publishers and designed and published Christmas cards. In 1915 they published a book called "The Forget-me-not Series of Private Greeting Cards," which contained a number of illustrated Christmas cards, the copyright in which belonged to the plaintiffs. The plaintiffs first of all issued the cards as private Christmas cards, and then for two or three years afterwards they sold them as ordinary Christmas cards.

In 1916 the defendants published a similar book called "The Imperial Art Series of Private Greeting Cards," which contained colourable imitations of seven of the plaintiffs' cards, and proceeded to sell large quantities of the cards at prices considerably lower than those which were charged by the plaintiffs. The plaintiffs accordingly brought this action claiming (1.) an injunction; (2.) an

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account of all sales and profits; (3.) delivery up of all copies or colourable imitations of their cards and of all books containing such cards, and damages for the detention and conversion thereof respectively; and (4.) damages for the infringement of their copyright in the cards. The plaintiffs obtained judgment on March 26, 1917, which, in addition to an injunction, directed delivery up of the infringing copies and plates and an inquiry as to the damages sustained by the plaintiffs by reason of the defendants having infringed their copyright.

On June 12, 1917, Eve J. made an order directing the defendants to make an affidavit stating the numbers of the infringing cards sold or disposed of by them and the names and addresses of the persons to whom the same had been sold or disposed of. On appeal the defendants admitted that the books containing the cards had been sold to influential retail traders, including a substantial number of the plaintiffs' customers, and the order of June 12, 1917, was varied by ordering that only the numbers of the customers to whom such books had been sold or distributed should be given.

The inquiry proceeded before the Master, and on February 4, 1918, he certified that damages to the amount of 590*l.* 13*s.* 8*d.* had been sustained by the plaintiffs by reason of the defendants having infringed their copyright. The Master arrived at this sum in the following way:—He found that the plaintiffs had sustained damage to the amount of 210*l.* in respect of general injury to their trade by the sale of the defendants' infringing books and cards to a considerable body of the plaintiffs' customers, including influential retail traders, at prices markedly lower than those charged by the plaintiffs; and, further, he assessed damages under s. 7 of the Copyright Act, 1911, at 138*l.* 10*s.* 4*d.* in respect of infringing cards sold by the defendants, and 242*l.* 3*s.* 4*d.* in respect of infringing cards in 5024 copies of the defendants' book.

The defendants now applied to vary the Master's certificate on the grounds (1.) that the judgment did not award the plaintiffs any damages for conversion under s. 7 of the Act, and that the total sum of 590*l.* 13*s.* 8*d.* certified by the Master included two sums of 242*l.* 3*s.* 4*d.* and 138*l.* 10*s.* 4*d.* claimed as and being in fact damages under that section, and (2.) that in any case the damages awarded by the certificate were wholly excessive.

Hughes K.C., and *H. S. Preston* for the applicants. The Master ought not to have given damages under s. 7 of the Act, and the damages which he has given are excessive. There was no allegation in the statement of claim based on s. 7, and the judgment only covers actual damages sustained by the plaintiffs. Sects. 6 and 7 provide alternative remedies ; a plaintiff cannot have both damages for conversion under s. 7 and damages for actual loss as well under s. 6. In the analogous case of a patent the owner cannot have both damages and an account of profits : *De Vitre* v. *Betts.* (1) The corresponding sections of the Copyright Act, 1842, came before the Court in *Muddock* v. *Blackwood* (2), and, although Kekewich J. held that a plaintiff was entitled to an injunction under s. 15 and to damages for conversion under s. 23, there is no indication that a plaintiff could have damages under both sections, and that is the view expressed in Copinger on Copyright, 5th ed. p. 199, quoting the judgment of James V.-C. in *Pike* v. *Nicholas* (3), which has been referred to by Younger J. in *Glyn* v. *Weston Feature Film Co.* (4)

Further, under the judgment in this case the plaintiffs elected to take general damages under s. 6 in respect of their loss, and, that being so, we submit they cannot be entitled to damages under s. 7 as well.

Tomlin K.C. and *M. R. Emanuel* for the respondents. The words in s. 6 are "all such remedies . . . . as are or may be conferred by law for the infringement of a right," and "a" right does not mean "copyright" alone ; the owner of copyright may concurrently exercise all his remedies at law in respect of the acts complained of, which acts may be not only an infringement of copyright, but also an infringement of another right. By s. 7 infringing copies are the property of the owner of the copyright, and when the infringer sells an infringing copy he is violating both the copyright and also the right of the owner of the copy to prevent a stranger from taking and selling it. In that case the owner of the copyright can sue for damages for infringement by virtue of s. 6 and for damages for conversion by virtue of s. 7. This case affords a good illustration, for here the infringing cards are the property of the plaintiffs and have been sold by the defendant, and the plaintiffs are

(1) (1873) L. R. 6 H. L. 319.
(2) [1898] 1 Ch. 58, 63.
(3) (1869) L. R. 5 Ch. 251, 260, n.
(4) [1916] 1 Ch. 261, 271.

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entitled to damages for that conversion; but that does not touch every part of the case, for the business of the plaintiffs has been damaged by reason of the public having found out that that particular class of goods can now be obtained in another market at a cheaper price, and in respect of that loss the plaintiffs are entitled to recover. There is nothing in the Act to show that the remedies are alternative and not concurrent; both sections are not aimed at the same mark. The judgment in *Muddock* v. *Blackwood* (1) shows that the learned judge thought that the remedies under the old Act were in fact concurrent, and that if the remedies were to be concurrent the Act should say so.

There was no suggestion before Eve J. or the Court of Appeal in this case that the inquiry should be limited in the way the applicants now suggest. The inquiry covers all damages occasioned by the defendants printing, publishing, selling, or distributing copies or colourable imitations and includes all damages arising from any sale and conversion.

Hughes K.C. in reply.

Cur. adv. vult.

May 7. PETERSON J. stated the facts, and continued: The first and main objection on the part of the defendants was that the Master was not entitled, in answer to the inquiry directed by the judgment, to have any regard to s. 7 of the Act of 1911. Sect. 6 of the Act keeps alive the right to damages for infringement of copyright. Mr. Tomlin, for the plaintiffs, presented a somewhat refined argument on this section; but it appears to me that the section plainly enacts that in cases of infringement the owner of the copyright shall have the usual civil remedies which are available where a similar right of property is infringed. Under this section the owner of the copyright can recover damages for the loss which he has sustained by reason of the infringement, or, if he prefers it, he can obtain payment of the profits which have been made by the infringer from the piracy.

Sect. 7 proceeds on very different grounds. By that section the infringing copies, including the plates, are to be deemed to be the property of the owner of the copyright, and the owner may, if he

(1) [1898] 1 Ch. 58, 63.

wishes to do so, "take proceedings for the recovery of the possession thereof or in respect of the conversion thereof." As the infringing copies are to be treated as property of the owner of the copyright he can require the infringer to deliver up his property to him, or, if his property has been sold, he can sue him for conversion of his property. The section contemplates an action of detinue in the one case and an action for conversion in the other case. The action is not based on damage occasioned by the infringement, but it is founded on the wrongful detention or the wrongful sale of the plaintiffs' property.

In the present action the statement of claim asked for (1.) an injunction, (2.) an amount of profits, (3.) delivery up of all copies or colourable imitations of the plaintiffs' cards and damages for detention and conversion, and (4.) damages for infringement of copyright. The distinction between ss. 6 and 7 was thus clearly recognized. But the judgment, in addition to an injunction, directed delivery up of the infringing copies and plates in the possession of the defendants and an inquiry as to the damages sustained by reason of the infringement of copyright. Now under such an inquiry the plaintiff can only recover the loss which he has sustained by the infringement; while an inquiry as to the damages occasioned by conversion of the plaintiffs' property under s. 7 would cover the gross proceeds which were or might have been realized from the sale of the infringing copies. In my judgment, then, this inquiry does not authorize an investigation into the damages occasioned by conversion and the Master was wrong in including damages under this head. It was said that the inquiry was to be directed to damages occasioned by reason of the defendants having infringed the copyright by printing, publishing, selling, or distributing copies or colourable imitations, and that they included all damages arising from any such sale, and therefore included damages arising from conversion. But this argument, in my view, is fallacious. The damages to be assessed are not the damages occasioned by the sale of copies, but damages occasioned by reason of the defendants having infringed the copyright by selling copies. The damages are confined to damages for infringement and do not include damages for conversion.

I may add, although this point was not discussed, that if the Master was right in assessing damages under s. 7 I am not at present

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satisfied that he was right in deducting the cost which the plaintiffs would have incurred if they had produced the cards in question, as damages for conversion depend, not on the cost of production, but on the value of the thing which has been converted.

In ordinary cases I should send the matter back to the Master for a new certificate ; but the defendants ask, and, as I understand, both parties desire, that I should endeavour to arrive at the proper amount to be allowed for damages in respect of the infringement by the sale of the plaintiffs' books and cards which is complained of. The number of books containing the seven infringing cards which the defendants published, sold, or parted with is 5024. These books were sold or distributed to or among 4729 customers, and the defendants admitted that these customers included influential retail traders and a substantial number of the plaintiffs' customers. They have sold the following numbers of the infringing cards : [His Lordship stated the numbers, and continued :] The sales therefore have been of an extensive character. If all these infringing cards had been published and sold by the plaintiffs they would have realized, deducting 33⅓ per cent. for discount, 380*l.* 13*s.* 4*d.* There should, however, I think, be some allowance for the probability that some of the cards would not have been disposed of, and accordingly under this head I assess the damages at 340*l.*

Objection was also taken to the sum of 210*l.* assessed by the Master for injury to trade on the ground that it was excessive, and it was suggested by counsel that 40*s.* would be ample. Before the Master the plaintiffs asked for 700*l.*, while the defendants' counsel suggested that 50*l.* would be sufficient. Now this was an extensive and deliberate piracy, and it was directed to what the defendants themselves admit was a substantial number of the plaintiffs' customers, and I have no doubt that the defendants have not in their admissions exaggerated the extent of their depredations on the plaintiffs' trade. Their conduct was aggravated by the fact that they offered the cards at a much lower price than that which the plaintiffs asked. In such cases as these the damages must necessarily be to a large extent a matter of conjecture, but on the whole, having regard to the extent of the defendants' illicit operations, I am not prepared to disagree with the Master in his finding that 210*l.* is a fair sum to be allowed under this head.

The result is that I find that the plaintiffs have sustained damage to the extent of 550*l.*

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Solicitors : *Jackson & Jackson, for Britcliffe & Son, Accrington; Emanuel, Round & Nathan.*

R. M.

In re ANGLO-CANADIAN LANDS (1912), LIMITED. PARK *v.* THE COMPANY.

PETERSON J.

1918

June 14.

[1915 A. 606.]

Company—Debenture Stock—Trust Deed—Remuneration of Trustees—Contract—Construction—Appointment of Receiver—Right of Trustees to subsequent Remuneration.

A trust deed for securing first mortgage debenture stock provided (by clause 39) that until the mortgaged premises were reconveyed or released, or until the whole of the same premises were realized under the trust for sale (neither of which events had happened), each of the trustees should be entitled to receive, and the company would pay by way of remuneration, the yearly sum of 105*l.* The deed also provided that the remuneration of the trustees should be an additional charge upon the mortgaged premises taking priority over any payment to the stockholders, and that the moneys to arise under the primary trust for conversion should be applied in the first instance in paying (inter alia) all remuneration payable to the trustees. The deed also empowered the trustees to appoint a receiver of the mortgaged premises in certain specified events, one of which afterwards happened, whereupon the trustees, in exercise of their power, duly appointed a receiver who was subsequently appointed receiver and manager by the Court in an action by the first mortgage debenture stockholders :—

Held, that the trustees having taken office in consideration of the contract in clause 39 of the trust deed were entitled to their remuneration from the date of, and notwithstanding, the appointment of a receiver.

In re Locke & Smith, Ld. [1914] 1 Ch. 687 distinguished.

ADJOURNED SUMMONS.

This was a summons in an action by the holders of first mortgage debenture stock in the above-named company. The applicants

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were the trustees, defendants to the action, of a trust deed dated December 19, 1912, charging certain property of the company in their favour for securing an issue of 80,000*l.* first mortgage debenture stock. On July 23, 1914, the applicants, in exercise of a power conferred by the trust deed, duly appointed a receiver on behalf of the stockholders. The action was commenced on April 30, 1915, and on May 7, 1915, the same receiver was appointed receiver and manager by the Court in the action. On June 29, 1915, judgment was obtained in the action ordering execution of the trusts of the trust deed and directing the usual inquiries and accounts, and on March 3, 1916, the Master made his certificate answering the inquiries.

This summons was taken out by the trustees of the trust deed asking (inter alia) that they should be paid out of the assets subject to the deed, or out of the proceeds thereof, their remuneration as trustees from July 24, 1914, and interest thereon.

The material clauses of the trust deed relative to the remuneration of the trustees provided as follows :—

Clause 18 : " At any time after the security hereby constituted shall have become enforceable or after a petition for winding up the company shall have been presented or a resolution capable of being confirmed as a special resolution to wind up the company shall have been passed or a notice shall have been given of a proposed extraordinary resolution for winding up the company (and so that no delay or waiver of the right to exercise the powers hereby conferred shall prejudice the future exercise of such powers) the trustees shall have the power to appoint a receiver and may in their discretion . . . . appoint in writing one or more persons to be a receiver or receivers of all or any part of the mortgaged premises with power from time to time to remove any receiver so appointed and appoint another in his place . . . ."

Clause 19 : " The trustees shall have power from time to time to fix the remuneration of any receiver appointed by them and direct payment thereof out of the mortgaged premises."

Clause 22 : " All moneys to arise under the primary trust for conversion and all moneys received under any of the powers hereby conferred upon the receiver or upon the trustees after the security hereby constituted has become enforceable shall be held by the

trustees or by the receiver receiving the same . . . . upon trust to apply the same . . . . :—

" (A) In payment of all costs charges and expenses incurred and payments made by the trustees or the receiver under any of the provisions herein contained and of all remuneration payable to the trustees or any receiver hereunder with interest thereon as hereinafter provided."

Clause 39 : " Each of the trustees shall be entitled to receive and the company will pay to each of the trustees until the mortgaged premises shall be re-conveyed and released or until the whole of such premises shall have been realised under the trust for sale hereinbefore contained by way of remuneration the yearly sum of 105*l.* payable by two equal half-yearly payments . . . . and in addition also such travelling and other expenses costs charges and outgoings which he may incur or become liable for or pay in connection with the execution of the trusts in these presents and the company will also (in addition to the right of indemnity by law given to the trustees) at all times keep indemnified the trustees against all actions proceedings costs claims and demands in respect of any matter or thing done or omitted by them in anywise relating to these presents. Provided always that the trustees may retain and pay to themselves out of any moneys in their hands upon the trusts of these presents the amount of the remuneration for the time being owing to them and of such costs charges and expenses as aforesaid and of all interest payable as hereinafter provided."

Clause 40 : " All costs charges and expenses incurred and all payments made by the trustees or any receiver in the lawful exercise of the powers hereby conferred upon them or him including all remuneration payable to the trustees or to the receiver shall be payable by the company on demand and shall carry interest at 5 per cent. per annum from the date of the same being incurred or becoming due and that notwithstanding that the proviso hereinbefore contained as to restoring possession of the mortgaged premises to the company shall have come into operation and all such costs charges and expenses and payments and all interest thereon and all remuneration payable to the trustees or any receiver hereunder shall be an additional charge on the mortgaged premises and shall be satisfied before any payment is made thereout to the stock-holders."

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The property charged by the trust deed comprised some 58,505.66 acres of land at Vegreville in the province of Alberta, Canada, and according to the law of Alberta this land had to be conveyed to the trustees as individuals and not as trustees. This land was being sold by the Canadian agents in detail, chiefly to purchasers on the instalment principle of payment, and the title to the land still stood in the names of the trustees, and this was not affected by the appointment of a receiver. The trustees had incurred, and were still incurring, considerable personal responsibilities in connection with being registered owners of the land, including liability for payment of Government and local taxes for which they were primarily responsible.

Tomlin K.C. and *C. W. Turner* for the applicants. The trustees are entitled to their remuneration. Neither of the events determining their right to remuneration has happened, and, that being so, their right to remuneration under clause 39 is as clear as was the right of the trustees in *In re Piccadilly Hotel, Ld.* (1) There is no condition that the remuneration is to be for services rendered as there was in *In re Locke & Smith, Ld.* (2), and on that ground this case is distinguishable.

Arnold Herbert K.C. and *H. B. Vaisey* for the respondent trustee for second debenture stock holders. We do not dispute that the remuneration of the trustees, so long as payable, is a charge on the mortgaged premises and carries interest, but we submit that the trustees have rendered no real services since the appointment of the receiver and that the Court does not give remuneration to trustees when some one else has done the work. This case is the converse to *In re Piccadilly Hotel, Ld.* (1), and in principle is not distinguishable from *In re Locke & Smith, Ld.* (2)

Hughes K.C. and *Fairfax Luxmoore* for the plaintiff in the action.

PETERSON J. stated the facts, and continued: In my opinion, under the contract contained in this deed each of the trustees is entitled to receive the remuneration mentioned in the contract until one of the two events mentioned in clause 39 has happened. The case urged against the view which I have taken is *In re Locke &*

(1) [1911] 2 Ch. 534. (2) [1914] 1 Ch. 687.

Smith, Ld. (1) It does not appear from the report in that case whether there was any power on the part of the trustees to appoint a receiver, but there was a trust deed which contained a provision that the company should in each and every year during the continuance of that security pay to the trustees for the time being of the deed as and by way of remuneration for their services as trustees the sum of 105*l.* by equal half-yearly payments as therein mentioned, and the learned judge held that a trustee was entitled to the remuneration down to the time of the appointment of the receiver, but that, inasmuch as he had not rendered any appreciable services since such appointment, he was not entitled to any subsequent remuneration. He said (2): "The question whether the same right to remuneration continued after the appointment of the receiver on July 14, 1911, has now to be considered. Mr. Sheldon argues that as the covenant by the company to pay remuneration is a covenant to pay in every year 'during the continuance of this security,' and as the security continues down to the final distribution of the proceeds of sale, the right to remuneration continues down to the same date. But that argument leaves out of sight the fact that the payment is to be made to the trustee 'as and by way of remuneration for his services.' There is nothing in this deed answering to the proviso in the deed before Swinfen Eady J. (3) whereby it was expressly stipulated that the appointment of a receiver should not determine the trustee's right to remuneration." Then the learned judge referred to the case of *Debenture Corporation* v. *Uttoxeter Brewery*, which is not reported, and proceeded: "Chitty J., dealing with a covenant similar to the one I have before me, admitted the trustee's claim to remuneration down to the appointment of the receiver but disallowed any remuneration after the appointment"; and the learned judge then continued: "In the ordinary course where a receiver is appointed in a debenture-holders' action the services of the trustee are terminated, and in such a case I think Chitty J.'s decision ought to be followed, for in such circumstances it would be little less than monstrous to charge the debenture-holders with the remuneration of both the trustee and the receiver." Then he alluded to cases in which the trustee may render services after the

(1) [1914] 1 Ch. 687.
(2) Ibid. 692.
(3) *In re Piccadilly Hotel, Ld.* [1911] 2 Ch. 534.

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receiver's appointment which would entitle him to receive remuneration notwithstanding that appointment. Now the case of *Debenture Corporation* v. *Uttoxeter Brewery* turned, apparently, on the provision that the corporation were to pay remuneration to the trustees for their services, and therefore the learned judge came to the conclusion that the trustees were to render services in return for which they were to be paid the remuneration, and that as they had not rendered these services they were not entitled to the remuneration under the deed. In that deed the remuneration was expressed to be for services to be rendered, but in the present case there is no reference to services in clause 39. The words there are, "Each of the trustees shall be entitled to receive and the company will pay to each of the trustees until the mortgaged premises shall be reconveyed and released or until the whole of such premises shall have been realised under the trust for sale hereinbefore contained by way of remuneration the yearly sum of 105*l.*" The trustees took office under this deed in consideration of the contract therein contained, namely, that until one of two events should happen—the reconveyance or release of the mortgaged premises or the realization of the whole of the premises under the trust for sale—they were to be entitled to the remuneration of 105*l.* per annum. Neither of these events has yet happened, and in my opinion the trustees are entitled to their remuneration notwithstanding the appointment of the receiver.

Solicitors: *Linklater & Co.; Slaughter & May.*

R. M.

In re WYATT'S APPLICATION.

PETERSON J.

1918

May 8, 14.

[1917 W. 200.]

Practice—Costs—Taxation—Assessment of Costs at a Gross Sum—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 38A—*Courts (Emergency Powers) Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 78), *s.* 1—*Mortgage—Leave to enforce Security—Increase of Rate of Interest—*"*Money or value of the property to which the costs relate.*"

In assessing costs at a gross sum under the latter portion of Order LXV., r. 27, sub-r. 38A, the taxing Master must have regard to all the circumstances of the case, including the three conditions therein specifically mentioned, namely, the nature of the business transacted, the interests involved, and the money or value of the property to which the costs relate; and if the costs have been caused or increased by the conduct of either party he should also take that fact into consideration before coming to the conclusion that the costs are excessive.

Upon a summons under the Courts (Emergency Powers) Act, 1914, for leave to enforce a mortgage security for 900*l.*, occasioned by the fact that the mortgagor, after agreeing to increase the interest from 4*l.* 10*s.* to 5*l.* per cent., refused to continue to pay the increased rate, and ultimately resulting, on the mortgagor undertaking to pay interest at the increased rate, in no order except that the mortgagees' costs be taxed and added to their security, the money or value of the property to which the costs relate is the sum of 900*l.*, and not merely the difference between the two rates of interest, and a gross sum for costs assessed under Order LXV., r. 27, sub-r. 38A, only upon such difference is assessed upon a wrong basis.

ADJOURNED SUMMONS.

The following statement of facts is taken from the considered judgment of Peterson J. :—" This is a summons to review taxation. The applicants, being mortgagees, applied under the Courts (Emergency Powers) Acts for leave to enforce their security so as to obtain payment of the principal money amounting to 900*l.* This application was occasioned by the fact that the respondent, after agreeing in August, 1915, to increase the interest from 4*l.* 10*s.* per cent. to 5*l.* per cent., in September, 1916, refused to continue paying interest at the increased rate. The summons was issued on January 31, 1917. There were two adjournments to enable the respondent to file evidence. Then there was an interview between the solicitors,

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and the respondent's solicitors intimated that if the mortgage was allowed to remain the respondent would pay interest at 5*l.* per cent. ; but, as appears from the bill of costs, the applicants' solicitors were unable to obtain a definite acceptance of these terms. The summons was restored, and the respondent's solicitors stated that they could not get definite instructions from their client, and asked for and obtained fourteen days' further time for filing evidence in opposition to the summons, and this time was subsequently extended by consent. The respondent's evidence was ultimately filed in August, 1917. The applicants then filed evidence in answer. When the summons came before the Master he intimated that as the security was sufficient he was not disposed to give leave to realize it if the interest was raised to 5*l.* per cent., and adjourned the summons in order that the respondent's instructions might be obtained. The respondent then endeavoured to impose a condition that the mortgage should not be called in for five years, and at the adjourned hearing before the Master on October 24, 1917, his solicitors declined to agree that interest at 5*l.* per cent. should be paid as from March, 1916, and the summons was adjourned to the judge. When the summons came before the judge the respondent by his solicitors undertook to pay interest at 5*l.* per cent. from March, and thereupon no order was made upon the summons except that the applicants' costs were ordered to be taxed and added to their security. The applicants carried in a bill for 30*l.* 5*s.* 10*d.* for taxation. After the bill had been subjected in the taxing office to some slight preliminary pruning, the taxing Master was invited to exercise the power conferred upon him by Order LXV., r. 27, sub-r. 38A, and he accordingly fixed 12*l.* 19*s.* as a reasonable and proper amount to be allowed ' having regard to the nature of the business transacted, the interests involved and the value of the property to which the costs related.' This sum of 12*l.* 19*s.*, as appears from the taxing Master's answers to objections, represents assessed costs 12 guineas and 7*s.* for ad valorem stamp. The taxing Master stated in his answers that but for the decision in *In re Commonwealth Oil Corporation* (1) he would not have assessed the costs in this way, and that there was no suggestion of any misconduct of any kind, and that he was fortified in his decision by the practice in the Chancery Division of fixing

(1) [1917] 1 Ch. 404.

the costs in applications made under the Courts (Emergency Powers) Acts at three guineas in ordinary cases with an extra guinea or so in some cases."

J. M. Gover for the applicants. In assessing costs at a gross sum under sub-r. 38A it is not enough for the taxing Master to say that the costs are excessive ; there must be something in addition to the excessive nature of the costs : *In re Johnston* (1) ; *In re Commonwealth Oil Corporation.* (2) In this case the Master has left out the other circumstances and has not even stated that the costs are excessive. The items for out-of-pocket expenses, including counsel's fees, attendances in chambers, and instructions to counsel, alone exceed 13*l.*, and it is impossible to see on what principle the Master came to the conclusion that 12*l.* 19*s.* was a proper assessment. This was a mortgagees' action, and one in which they ought not to be deprived of any proper costs, and to which the general principle applies, namely, that a litigant, if successful, is entitled to a reasonable indemnity. The taxing Master has acted on a wrong principle and there should be a review.

Warwick Draper for the respondent. The sum involved was only the difference between interest at 4*l.* 10*s.* and 5*l.* per cent. on 900*l.*, and in respect of that there is a bill of costs for 30*l.* 5*s.* 10*d.*, which the Master thought excessive having regard to the nature of the business transacted and the interests involved. In sub-r. 38A the words " from any other cause " are not ejusdem generis with the previous part of the clause : *In re Commonwealth Oil Corporation* (2) ; and the sub-rule starts again with them. When the taxing Master departed from item taxation and assessed the costs under the latter part of the sub-rule on the ground that they were excessive, he exercised the discretion conferred upon him by the sub-rule and assessed the costs at 12*l.* 19*s.* having regard to the interests involved, i.e., the increase of the rate of interest, and the Court will not interfere with the exercise of his discretion on a question of quantum : *In the Estate of Ogilvie* (3) ; *In re Brown.* (4)

Gover in reply.

Cur. adv. vult.

(1) [1904] 1 Ch. 132.
(2) [1917] 1 Ch. 404.
(3) [1910] P. 243.
(4) (1867) L. R. 4 Eq. 464.

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May 14. PETERSON J., after stating the facts as above set out and the reference by the Master to the practice in the Chancery Division of fixing the costs in applications under the Courts (Emergency Powers) Acts, continued: In many small cases under the Acts costs are assessed in the Chancery Division in the way to which the taxing Master refers, but there is not any invariable practice to this effect, as, indeed, is shown by the order in the present case; and if the costs of such an application have been increased by the delay or unreasonable conduct of the respondent, I cannot suppose that any judge would come to the conclusion that the applicant ought to bear the additional costs which have been occasioned by the respondent's conduct.

In this case the taxing Master has acted under the latter portion of Order LXV., r. 27, sub-r. 38A. The decision of Sargant J. in *In re Commonwealth Oil Corporation* (1) has established that the words "from any other cause" do not mean "any other cause of a similar nature," and that the taxing Master can exercise the powers given by the rule although there has not been delay, misconduct, or negligence where the costs are excessive "having regard to the nature of the business transacted or the interests involved or the money or value of property to which the costs relate, or to the other circumstances of the case." But these words cannot, I think, be read disjunctively. A taxing Master could not, for instance, properly have regard only to the value of the property and disregard the fact that the costs have been occasioned by the chicanery or misconduct of a defendant. He must have regard to all the circumstances of the case, including the three conditions to which his attention is specifically called by the rule; and if the costs have been caused or increased by the conduct of the defendant he must take that fact into consideration before he comes to the conclusion that the costs are excessive.

Now in cases of this description the discretion exercised by the taxing Master should not be interfered with unless he has proceeded on a wrong principle or has exercised his discretion on wrong grounds. If it appears to him that, having regard to all the circumstances of the case, the costs are excessive, he is bound to allow only such sum as may be reasonable and proper and may assess that amount at a

(1) [1917] 1 Ch. 404.

gross sum. The question here is, Has the taxing Master acted on a wrong principle ? Counsel for the respondent contended that the money or value of the property to which the costs related was the difference between 4*l.* 10*s.* and 5*l.* per cent., and suggested that this was the view of the taxing Master. I accordingly thought it expedient to see the taxing Master and ascertain what he had in view when he referred to the value of the property to which the costs related, and I find that he took the view that the value of the property in question was the difference between the two rates of interest. In my opinion this was an error. The application was for leave to realize a security for 900*l.*, and the costs were incurred in connection with that application. The applicants were no doubt content to let the mortgage remain for the present if the rate of interest was raised as from March, 1916, but the respondent was not prepared to accede to this suggestion until the matter came before the judge in person. This application could only be one for leave to realize ; and I think that the taxing Master was wrong in thinking that the value of the property to which the costs related was only the difference between the two rates of interest. He has, therefore, arrived at his conclusion on a wrong basis, as he has not taken into consideration the value of the property to which the costs related, and consequently this matter must go back to him, and then if it is contended that he should exercise his powers under sub-r. 38A he will, no doubt, consider amongst other things the question whether much of the costs has not been occasioned by the delay of the respondent in offering the terms to which he finally agreed when the order was made.

Solicitors : *Mills & Morley ; Fraser & Christian, for W. H. Bolitho, Portsea.*

R. M.

YOUNGER J.
1918
June 13.

In re LING & DUHR, ENEMIES.

[MANCHESTER DISTRICT REGISTRY.]

[1917 L. 462.]

Practice—War—Emergency Legislation—Enemy Property vested in Custodian—Debt alleged to be due from Enemy—Payment out of Moneys in Custodian's Hands—Debt not proved not to have been already paid in Enemy Country—Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12)*—Debt due to Enemy—Lien on or Set-off against Enemy Property—Forms of Orders.*

The Court will not admit a creditor's claim to be paid his debt out of his enemy debtor's property vested in the custodian under the Trading with the Enemy Amendment Act, 1914, unless satisfied beyond reasonable doubt that the debt is due and has not been already paid or satisfied under emergency legislation in the enemy country.

Conversely, when, on an application to vest in the custodian a debt alleged to be due from a person carrying on business in this country to an enemy, the debtor alleges that it may have been already paid by means of funds of his vested in a custodian in the enemy country, the Court will assume in his favour that it may have been paid, and will protect for his benefit all moneys paid by him to the custodian in respect thereof.

BY a vesting order under the Trading with the Enemy Amendment Act, 1914, made on May 15, 1917, on a summons of the Fine Cotton Spinners and Doublers Association, Limited, claiming to be a creditor of the above-named Ling & Duhr, an inquiry was directed of what was due from Ling & Duhr to the association, not being enemies within the Act. In answer to the inquiry the registrar certified that there was due to the association a sum of 4542.10 marks, being part of a claim of 5565.10 marks; he did not allow the balance of 1023 marks, owing to there not being any evidence produced that that sum had not been paid to the Schaffenhausen Bankverein Filiale in Crefeld (which, under the contract between the parties, would be payment to the association) prior to the outbreak of war between England and Germany on August 4, 1914. The claim of 5565.10 marks was in respect of the price of goods sold and delivered by the association to Ling & Duhr, who carried on business in Germany. According to the usual course of dealing between the association and Ling & Duhr, payment under discount

would have been due as to 1023 marks prior to the outbreak of war and as to 4542.10 marks after the outbreak. The custodian now applied to vary the certificate by disallowing the claim, even as to the balance of 4542.10 marks, on the ground of lack of evidence that it had not been paid.

Austen-Cartmell, for the custodian.
Sheldon, for the association.

YOUNGER J. This is a summons by the custodian to vary the registrar s certificate in so far as he has allowed to rank 4542.10 marks part of a debt of 5565.10 marks which is alleged to be due from the enemy to the Fine Cotton Spinners and Doublers Association, Limited. The ground on which it is sought to vary the certificate is that there is no sufficient evidence that the whole debt has not been already paid in Germany to or on account of the Fine Cotton Spinners and Doublers Association in accordance with the terms of the enemies' obligation in that behalf.

The debt arose in this way. Apparently certain goods were, under contracts entered into between the agent of the creditors and the enemy, supplied by the agent to the enemy in Germany from time to time, upon the terms that the payment of the price, under discount, was to be made to the credit of the creditors with the Schaffenhausen bank at Crefeld, and that if these payments were made within thirty days of their becoming due the debtor (the enemy) was entitled to a discount provided for. The 5565.10 marks represent as to 4542.10 marks sums which, if paid thirty days after they became due, but not earlier, would have been paid in to the credit of this bank at Crefeld after the outbreak of war, and it is contended on behalf of the creditors that, inasmuch as presumably it would have been illegal in Germany for the enemy to make payments, after the outbreak of war, to the credit of the Fine Cotton Spinners and Doublers Association, even with a German bank, the money must be deemed not to have been paid, so that the debt is still unsatisfied.

Now, in dealing with the funds vested in the custodian in pursuance of orders made under this Act, I have always considered it to be the duty of the Court to see that no claim on the part of a creditor

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is admitted unless he is able to satisfy the Court with the most reasonable certainty that it is due. First of all, as I have frequently had occasion to say, this Act is not an Act primarily for the benefit of creditors at all; its main purpose is to create a fund to be protected and preserved in accordance with the terms of the preamble, with a view to such arrangements after the war as may seem good to His Majesty in Council, and the intermediate payments out of the fund to creditors are merely incidental and discretionary. It is essential beyond all things that those who have the administration of that central fund while the war still continues should be careful to see that no payments out of it are made which would be difficult to justify after the war if an account in respect of them has then to be rendered to the enemy concerned. Accordingly, if any claim is made by a creditor to be paid out of his enemy debtor's fund a debt which he says is due to him, we require such evidence as satisfies us beyond reasonable doubt that the debt is due. In this case I am not satisfied that the debt is due. First, I am not satisfied that the debt has not been paid in accordance with the terms of the contracts to the credit of the Fine Cotton Spinners and Doublers Association with the Schaffenhausen bank. It was to the interest of the enemy to make the payment in order to obtain his discount, and I have no reason to suppose that such payment, if made by him, would have been in any sense illegal, even if the payment were made after the outbreak of war, and, as I say, I can see many reasons why, if not illegal, he would desire to make it. Secondly, I see no reason to suppose, if the debt was not paid in that way to the credit of the Fine Cotton Spinners and Doublers Association with the Schaffenhausen bank, that it has not been paid since, under emergency legislation in Germany similar to our own, either into the Reichsbank or to some official custodian, and, though it is no part of my present duty to state what for all purposes would be the effect of such payment, it is sufficient to say that payments made in Germany by the enemy in question to the Reichsbank, or to such other custodian or authority as may be prescribed by German law to receive them, would be sufficient to justify the Court under this jurisdiction in refusing to direct payment out of the funds in the hands of the custodian to a creditor whose claim had been so satisfied, and particularly in a case like the present, where

the contract in respect of which the creditor claims was one made in Germany, to be performed in Germany, and altogether subject in its incidents and rights to German law. Accordingly, it appears to me that there has been no such evidence tendered on behalf of the creditors here as would justify me in saying that, as matters stand to-day, any payment out of this fund should be made to them. On the other hand, the fund belonging to this particular enemy is ample for payment of this debt if it is established later on, and, if hereafter the applicants are in a position to show that neither in the one way I have described nor in the other has the debt of the enemy to the association been satisfied in Germany, there will be nothing to prevent them making another application to have allowed this debt which on this application is disallowed.

I will only make one further observation. With the same desire to protect debtors against claims under this jurisdiction which are or may at the moment of the demand have been satisfied though that fact cannot be definitely established, when an application is made to vest in the custodian debts which are alleged to be due from a person resident or carrying on business in this country to an enemy, and it is alleged by the debtor that the debt may have been already paid in Germany by means of funds of his in that country vested in a German custodian, we always follow the principle of assuming to a certain extent in favour of such a debtor that the debt may have been paid thereout, taking care that he is not by virtue of this procedure called upon to pay it twice over. On the other hand, we do not allow the central fund to stand the risk of being depleted should the debt not have been paid. The order vesting the debt accordingly provides that, although vested, it is not to be applied or disposed of without notice to the debtor, so that, in the event of its turning out that the debt has been paid in Germany, the debtor will receive his money back again. We also in many cases allow the money to remain in the debtor's hands on proper terms so as to spare British industry all possible inconvenience from the working of this Act. The primary care of the Court in both aspects of the matter is to protect the central fund which, according to the terms of the statute as I read it, it is the paramount duty of the Court to do.

In these circumstances I think that the application to vary this

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certificate ought to succeed, without prejudice to any further application the creditors may be advised to make to have their debt admitted upon further evidence. There will be leave to appeal. The order will be that the claim of the Fine Cotton Spinners and Doublers Association, Limited, for 5565.10 marks be wholly disallowed on the ground that there was no evidence before the registrar that the claim had not been paid by the enemies to the Schaffenhausen Bankverein Filiale, Crefeld, which, according to the evidence, would be payment to the association, but without prejudice to a further application that may be made if and when evidence of non-payment shall be forthcoming, the fund in the meantime not to be dealt with without notice to the creditors. (1)

Solicitors: *Coward & Hawksley, Sons & Chance; Rawle, Johnstone & Co., for Addleshaw, Sons & Latham, Manchester.*

(1) An order known as the *Freudenberg* order, so called from the fact that it was first made by the judge in proceedings re an enemy of that name, was made at the instance of, and in reference to a debt owing by, an English debtor who alleged that large sums were owing to him in Germany which it was possible might have been seized under the German emergency legislation to answer the debt due from him to Freudenberg.

The present form of the order is as follows:—

"Let the right to receive sue for or recover all moneys owing to the above named enemy firm by the respondent A. B. vest in the Public Trustee the custodian for England and Wales under the Trading with the Enemy Amendment Act, 1914,

"And the respondent A. B. by his counsel admitting that he is or would but for any such liquidation thereof as is hereinafter mentioned be indebted to the enemy firm in the sum of £*x* but alleging that there are debts due to him from persons in Germany which were on the commencement of the war still outstanding and which may have been seized and applied in or towards liquidation of his indebtedness to the enemy firm and accordingly asking that in the event of his being ordered to pay such sum of £*x* to the custodian such directions may be given in regard thereto as hereinafter appearing

"And the judge being of opinion that upon payment by the respondent A. B. to the custodian of such sum of £*x* such directions as hereinafter appearing should be given in regard thereto

"And the respondent A. B. by his counsel submitting to the order for payment next hereinafter contained

"Let the respondent A. B. forthwith pay the said sum of £*x* to the custodian

"And order that no part of the said sum of £*x* is to be applied in or towards payment of the debts of the enemy firm or the costs of this application or otherwise dealt with by the custodian except under an order of the Court to be made upon an application of which notice shall be given to the respondent A. B."

The order is now used whenever the judge considers that a case is made for "holding up" any moneys or other property which are vested in the custodian and ordered to be paid or made over to him. The introductory words of the order are varied to meet the particular cases, and provisions for re-lending the money on security are frequently, when asked for, inserted.

An order known as the *Blydenstein* order, so called from its having been first made at the instance of the English firm of B. W. Blydenstein & Co., is also frequently made. The object of this order is to preserve any lien, charge, or set-off—often somewhat vague—which the English debtor or holder of enemy property may have against or in respect of the debt owing or property held by him. The following is an extract from an order in a case in which the "S. bank" owed a sum of money to the enemy and held on his behalf the certificates for certain shares registered in the enemy's name. The order, after the usual directions for vesting payment and transfer, proceeded as follows:—

"And in view of the matters which are mentioned or referred to in paragraphs 3 and 4 of the said affidavit of the said A. B. the judge doth direct that (*a*) no part of the said sum of £*x* is nor save as aforesaid" (that is, by transfer to the custodian) "are any of the shares respectively specified in the said second schedule hereto nor is any part of the dividends on such respective shares which may have been or may be received by the custodian to be dealt with by him except under an order of the Court to be made upon an application of which notice shall be given to the respondents the 'S. bank' and (*b*) the respondents the 'S. bank' are notwithstanding anything in this order contained or done or suffered hereunder to be and remain entitled to such lien charge set off and other rights (if any) against or in respect of the said sum of £*x* and the said shares respectively as they would have had against or in respect of the same if such sum had not been paid over to the custodian and the certificates for such shares had remained in their possession and there had been no such transfers as hereinbefore directed."

A. L.

NEVILLE J.
1918
July 22.

In re DUNSTAN.
DUNSTAN *v.* DUNSTAN.

[1917 D. 713.]

Will—Construction—Gift of Freeholds to A.—Gift after A.'s Death of whatever remained of the Freeholds to B.—Repugnancy—Death of A. in Lifetime of Testatrix.

The principle that where there are in a will successive limitations of personal estate in favour of several persons absolutely the first of those persons who survives the testator takes absolutely, although he would have taken nothing if any previous legatee had survived and taken, also applies to real estate.

Where, therefore, a testatrix by her will gave freeholds absolutely to A. subject to the bequest that whatever of the freeholds should remain after A.'s death should be given to a named charity:—

Held, that if A. had survived the testatrix the gift to the charity would have been repugnant and void, and A. would have taken absolutely.

But *held*, that, A. having died in the lifetime of the testatrix, the doctrine of repugnancy did not apply, and the gift to the charity was accelerated and took effect.

The principle of *In re Lowman* [1895] 2 Ch. 348, a case of leaseholds, extended to freeholds.

ADJOURNED SUMMONS.

Agnes Dunstan, by her will dated May 4, 1895, after directing the payment of her debts and testamentary expenses, gave to her cousin the Rev. James Banfield the whole of her freehold and personal estates "for his sole use and benefit absolutely subject to the following bequests. First, I desire that my executor hereinafter named shall pay to my cousin Amelia Rosewarne of Helston in the county of Cornwall the sum of ten pounds per year to be paid quarterly out of my estate as long as she shall live. Secondly I desire that after my executor's death whatever of my freehold properties shall remain shall be given to the homes of Dr. Barnardo at Stepney and elsewhere for the sole benefit of the institution for ever." And the testatrix appointed the Rev. James Banfield to be the sole executor of her will.

The testatrix died in February, 1917. The Rev. James Banfield

having predeceased the testatrix, letters of administration to her estate with the will annexed were granted to the plaintiffs, two of her next of kin. The personal estate of the testatrix amounted to about 870*l.* Her real estate was sold and realized 209*l.*

This was a summons to determine whether upon the true construction of the said will and in the events which have happened the freehold properties of the testatrix, subject to due provision being made for the annuity bequeathed by the will, were undisposed of, or whether Dr. Barnardo's Homes took any and what interest therein.

John Dunstan, the heir-at-law of the testatrix, died in June, 1917. No question arose as to her personal estate.

Harman for the plaintiffs.

Fairfax Luxmoore for the executors of the heir-at-law. On the construction of the will there is an absolute gift of the freeholds to the Rev. James Banfield, and the gift of "whatever shall remain" of them after his death is repugnant and void, so that the gift to him remains unaffected: Theobald on Wills, 7th ed. pp. 514, 648; *In re Jones* (1); *In re Pounder* (2); and he having died in the lifetime of the testatrix, the freeholds were undisposed of and passed to the heir-at-law.

F. Baden Fuller for Dr. Barnardo's Homes. The freeholds are claimed on two grounds: First, the gift to the Rev. James Banfield is qualified by the words "subject to the following bequests," and it is submitted the intention is to give him a life interest only with a gift over to the charity: *Constable* v. *Bull* (3); *In re Sanford.* (4) Secondly, if that view is wrong, it is a case of successive absolute gifts of the same property, and, the first legatee having died in the lifetime of the testatrix, the doctrine of repugnancy does not apply and the second gift is accelerated and takes effect: *In re Lowman.* (5) It is true that case is a decision on leaseholds and that there is no direct decision on freeholds, but it is submitted that the same principle applies.

Fairfax Luxmoore in reply on *In re Lowman.* (5)

(1) [1898] 1 Ch. 438.
(2) (1886) 56 L. J. (Ch.) 113.
(3) (1849) 3 De G. & Sm. 411.
(4) [1901] 1 Ch. 939.
(5) [1895] 2 Ch. 348, 354, 358.

NEVILLE J. 1918 DUNSTAN, *In re.* DUNSTAN *v.* DUNSTAN.

NEVILLE J. The testatrix in this case, after directing the payment of her debts and testamentary expenses, gives all her freehold and personal property to the Rev. James Banfield, whom she afterwards appoints her executor. Stopping there for a moment, that is an absolute gift. But then come the words "subject to the following bequests," and first she gives an annuity of 10*l.* to her cousin to be paid out of her estate, and that, I think, may be a charge upon both the real and personal estate; then, secondly, she desires that after her executor's death whatever of her freehold property shall remain shall be given to Dr. Barnardo's Homes. On the construction of the will I do not think that the absolute interest in the freeholds given to the executor is cut down to a life interest with a gift over to the charity, and it seems to me on the whole difficult to say that there is not a repugnancy between the two gifts in spite of the words "subject to the following bequests." Consequently, if the executor had survived the testatrix I would have held that he took absolutely, and the gift to the charity would have failed. But, he having died in her lifetime, there arises the question whether the principle of the decision in *In re Lowman* (1) is applicable. That was a case of leaseholds, and Lindley L.J. says: "A bequest of personalty to a person in tail is a bequest to him absolutely; and a bequest to some one else, subject to the interest given to him, is repugnant and void if the legatee survives the testator; and it is contended that it is so even if he does not." That is a clear and precise statement. Then the learned Lord Justice goes through the authorities, which are all cases of personal estate, and says: "The principle which I gather from these cases is, that where there are successive limitations of personal estate in favour of several persons absolutely, the first of them who survives the testator takes absolutely, although he would take nothing if any other legatee had survived and taken; or, in other words, in the case supposed the effect of the failure of an earlier gift is to accelerate, and not destroy, the later gift." And then he states in clear and forcible language why the doctrine of repugnancy does not apply where the first legatee dies in the lifetime of the testator (2): "The doctrine of repugnancy has no application to gifts which fail; the doctrine does not come into operation until somebody takes, and it is only those limitations which

(1) [1895] 2 Ch. 348, 354, 357. (2) [1895] 2 Ch. 358.

defeat the interest some one takes that are void, on the ground that they are inconsistent with what is given to him." Therefore the doctrine of repugnancy is not applicable unless there is a previous taker. Here the doctrine does not apply because the first legatee did not survive the testatrix. But Lindley L.J. expressly limited his decision to personal estate, and said: "Whether, if land be devised to A. in fee, with remainder to B. in fee, B. can take if A. dies in the testator's lifetime, is a question which does not arise on the present occasion, and on which I say nothing." It seems to me, however, having regard to the reasoning of the judgments in *In re Lowman* (1), that no sound distinction can be drawn between real and personal estate, and therefore, extending the principle of that decision, as I now do, to real estate, I come to the conclusion that, the first devisee of the freeholds having died in the lifetime of the testatrix, the gift to Dr. Barnardo's Homes takes effect subject to any liability in respect of the annuity.

Solicitors: *Kingsford, Dorman & Co., for E. L. Carlyon, Truro; Nisbet, Daw & Nisbet.*

(1) [1895] 2 Ch. 348.

H. L. F.

ASTBURY J.
1918
July 11, 12.

In re LEWIS.
BUSK *v.* LEWES.

[1918 L. 126.]

Heirlooms—Will—Construction—Chattels in Mansion House—To be enjoyed with Mansion House—Remainderman in Tail—Vesting.

By a will of 1844 a testator, having devised his real estates in strict settlement, bequeathed all the chattels "in and about my mansion house called Llanairon at the time of my decease" to his trustees upon trust to permit the same from time to time "to go and be held and enjoyed with the said mansion house so far as the rules of law and equity will permit" by the persons for the time being "entitled to the possession of my real estates." This was followed by a clause precluding the chattels from vesting absolutely in any tenant in tail by purchase unless he attained twenty-one, but entitling him to the use and benefit thereof during minority:—

Held, that the vesting of the chattels was not postponed until actual possession of the real estates, but that they had vested absolutely in the first tenant in tail by purchase on his attaining twenty-one, although only a remainderman and never in actual possession.

In re Lord Chesham's Settlement [1909] 2 Ch. 329 distinguished.

ORIGINATING SUMMONS.

By his will, dated October 25, 1844, a testator devised his real estates to the use of his wife for life, with remainder to his trustees during his sister Eliza's life upon trust for Eliza for life, with remainder to the use of his trustees during his niece Williama's life upon trust for Williama for life, with remainder to the use of Williama's sons successively according to seniority in tail male, with remainder to the use of Williama's daughters successively according to seniority in tail general, with remainder in fee to the use of a nephew who predeceased the testator.

The testator bequeathed all the household goods, furniture, plate, linen, china, glass, pictures, horses, carriages, and other effects whatsoever "in and about my mansion house called Llanairon at the time of my decease" to his trustees "upon trust to permit the same from time to time to go and be held and enjoyed with the said mansion house so far as the rules of law and equity will permit by the person or persons who for the time being shall be entitled to the possession of my real estates by virtue of this my will yet so that the

said furniture plate and other effects shall not vest absolutely in or become the property of any child of my said niece Williama . . . . unless such child shall attain the age of twenty-one years, but nevertheless such child respectively shall during his or her minority be entitled to the use and benefit thereof."

The testator then directed his trustees to cause schedules and inventories of the said furniture, plate, and other articles to be taken and two copies to be made and signed and to keep one of them and leave the other at the said mansion house and from time to time cause the same to be signed "by the person for the time being entitled in possession to my real estates under the trusts of this my will." The testator also directed his trustees from time to time to inspect and examine into the state of the said furniture, plate, and other effects and to cause such reparations, restorations, or replacings to be made thereof at the expense of "the person or persons for the time being entitled to hold use and enjoy the said furniture plate and other effects under the trusts of this my will" as they should think proper.

After bequeathing certain pecuniary legacies the testator charged his real estate with the payment of so much of his debts, funeral, and testamentary expenses and legacies as his personal estate not specifically bequeathed should fall short of paying, his will being that so much of his personal estate as was specifically bequeathed should not be applied in discharge thereof.

The trustees were appointed executors, but there was no bequest of residuary personal estate.

The testator died on July 4, 1855, leaving his wife, sister, and niece surviving.

The testator's sister Eliza died on April 17, 1863, a widow and intestate.

The testator's niece Williama, daughter of Eliza, died a widow on July 17, 1883, having had two children, namely, a son, John, the tenant in tail male in remainder, who attained twenty-one on January 6, 1866, and died a bachelor on February 4, 1885, and a daughter, who died a spinster in September, 1879.

The testator's wife, the life tenant, died on December 17, 1917, aged 103.

On January 31, 1918, the present trustees of the will issued this

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summons to determine (inter alia) whether the heirlooms had vested in John, the first tenant in tail male in remainder, on his attaining twenty-one, or whether they fell into the undisposed of residuary personal estate.

Brabant for the trustees.

Bryan Farrer for John's representatives. Chattels directed to be held and enjoyed by the persons from time to time entitled to the possession of settled real estate vest in the first infant tenant in tail at birth: *Foley* v. *Burnell* (1); *Vaughan* v. *Burslem.* (2) This, as in the present case, is usually obviated by a provision that they are not to vest in a tenant in tail by purchase unless he attains twenty-one. It is no doubt also possible "by apt words" to postpone the vesting until actual possession: *In re Fowler.* (3) But prima facie the latter postponement is not intended, as it prevents the life tenant and adult remainderman in tail resettling the chattels with the estates: Davidson's Precedents, 3rd ed. vol. iii. p. 626. Very clear and unambiguous words are therefore required to effect this postponement: Jarman on Wills, 6th ed. p. 698. Doubtful words will not do: *Lord Scarsdale* v. *Curzon* (4); *In re Fothergill's Estate* (5); as in these cases "possession" prima facie refers to the vesting of the estate, whether in possession or remainder, and not to actual possession or manual receipt of the rents: *Martelli* v. *Holloway.* (6) Omitting cases of clear words such as *Potts* v. *Potts* (7) ("become seised"), *Lord Scarsdale* v. *Curzon* (8) ("seised of or entitled to the actual freehold"), and *In re Angerstein* (9) ("actual possession"), this wholesome rule has with one exception been applied from the date of *Foley* v. *Burnell* (1) up to the present time, the most recent cases being *In re Parker* (10), *In re Beresford-Hope* (11), and *In re Fowler.* (12)

The one exception was *In re Lord Chesham's Settlement.* (13) In that case the chattels were to be "used held and enjoyed with the

(1) (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319.
(2) (1790) 3 Bro. C. C. 101.
(3) [1917] 2 Ch. 307, 325.
(4) (1860) 1 J. & H. 40, 51.
(5) [1903] 1 Ch. 149.
(6) (1872) L. R. 5 H. L. 532.
(7) (1846) 3 J. & Lat. 353; affirmed (1848) 1 H. L. C. 671.
(8) 1 J. & H. 40.
(9) [1895] 2 Ch. 883.
(10) [1910] 1 Ch. 581.
(11) [1917] 1 Ch. 287.
(12) [1917] 2 Ch. 307.
(13) [1909] 2 Ch. 329.

mansion house called Latimer" by the persons for the time being "entitled to the said mansion house." To the surprise of the whole profession the Court of Appeal treated these words as "clear words" requiring actual possession. They based their decision on a previous decision of Chitty J. in *In re Lord Chesham.* (1) But Chitty J. only decided that the life tenant could not remove the chattels from Latimer. The question whether they would vest absolutely in an adult remainderman was not before him: see Jarman on Wills, 6th ed. pp. cccvi., 698. The case is so contrary to the uniform current of authority that it should be followed only if the words are identical and the facts similar. Now in *In re Lord Chesham's Settlement* (2) there were two mansion houses, but the chattels were to be "used held and enjoyed with" Latimer by the persons entitled to Latimer. Here there is only one mansion house and the chattels are to "go and be held and enjoyed with the said mansion house" by the persons entitled to the possession of "my real estates." The facts are pro tanto different, and the language is not identical. The Court is therefore not bound by the construction in *In re Lord Chesham's Settlement.* (2)

Sheldon for the next of kin. This is a pure case of construction of a particular will. The Court's duty is to ascertain the testator's intention as expressed in that will, and to give effect to that without regard to other wills, possibly more in accordance with the feelings of modern conveyancers: *In re Morgan* (3); *In re Palmer.* (4) Apart from authority, no one could doubt the present testator's intention. (5) The chattels are to "go and be held and enjoyed with the said mansion house" by the persons "entitled to the possession of my real estates." How can a remainderman enjoy them with the mansion house prior to actual possession? The inventory and repairing clauses point in the same direction.

The will was made in 1844, and it is very possible that the testator used one of the forms of that date expressly designed to prevent the chattels vesting in a remainderman without appreciating the inconvenience of that course: see Davidson's Precedents, 3rd ed. vol. iii.

(1) (1886) 31 Ch. D. 466.
(2) [1909] 2 Ch. 329.
(3) [1893] 3 Ch. 222, 227.
(4) [1893] 3 Ch. 369, 373.
(5) See *In re Duckett* [1918] 1 I. R. 110, C. A.; Current Digest, 115.

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p. 626. (1) This postponement of vesting, however inconvenient, is in fact adopted by the Court in moulding executory trusts so as to make the chattels follow the realty as long as possible: *In re Beresford-Hope.* (2) The testator certainly did not foresee that no remainderman would ever come into possession, so that there would be an intestacy as to the chattels. But his will must be construed without regard to subsequent events: *In re Parker.* (3)

If, however, this will is to be construed by comparing it with other wills, it cannot be distinguished from *In re Lord Chesham's Settlement.* (4) It is even stronger, as the words here are "entitled to the possession of my real estates," whereas in that case the words "the possession of" were absent. *In re Parker* (5) is obviously distinguishable, as there was nothing about use and enjoyment with the mansion house. The same remark applies to *In re Beresford-Hope* (6), where the words "to go and be held with the said Bedgebury estate" were mere words of devolution.

Manning and *W. M. Spence* for other parties.

ASTBURY J. The question is whether on the true construction of the will the settled chattels vested in the tenant in tail male in remainder who attained twenty-one but predeceased the life tenant, or whether, all other limitations having failed, and there being no residuary bequest of personalty, there is an intestacy as to these chattels. [His Lordship read the limitations of the real estate and the heirlooms clause.] It is clear that the provisions as to inventories, inspection, and repairs must be limited to the life tenancies, as they are obviously inapplicable to an absolute owner who can repair or not as he likes.

Apart from the recent decision of the Court of Appeal in *In re Lord Chesham's Settlement* (4) the point would be unarguable. Where a settlement contains a declaration that chattels are to be held and enjoyed by the persons from time to time entitled to the possession of the settled real estate, they vest in the first tenant in tail on his birth. "Otherwise," as pointed out by Lord Commis-

(1) For similar forms see Bythewood's Precedents (1849), vol. xi. p. 859, and L. R. 5 H. L. 93, n. The form was used in 1861: see [1904] 2 Ch. 496.

(2) [1917] 1 Ch. 287, 298.
(3) [1910] 1 Ch. 581, 585.
(4) [1909] 2 Ch. 329.
(5) [1910] 1 Ch. 581.
(6) [1917] 1 Ch. 287.

sioner Ashhurst in *Foley* v. *Burnell* (1), "the absurdity must happen of the personal estate being tied up longer than the real." And where a proviso is added that the chattels are not to vest in any tenant in tail by purchase unless he attains twenty-one, then, if the tenant in tail attains twenty-one while his estate is in remainder, he becomes absolutely entitled to the chattels subject to the life tenant's interest. If it is desired to postpone the vesting until the tenant in tail comes into actual possession, clear and unambiguous words to that effect must be used: see Jarman on Wills, 6th ed. p. 698.

The leading authority which has always been followed is *Foley* v. *Burnell*. (2) In that case chattels in certain houses devised in strict settlement were bequeathed "to be held and enjoyed by the several persons, who, from time to time, should respectively and successively be entitled to the use and possession of the same houses respectively, as, and in the nature of heir-looms, to be annexed, and go along with such houses respectively for ever." Notwithstanding this language it was held that the chattels vested absolutely in an infant tenant in tail in remainder who predeceased the life tenant.

In *Martelli* v. *Holloway* (3), where no one was entitled to the settled personalty until he attained twenty-one and became entitled to an estate tail in possession in the real estate, the House of Lords held that the rule in *Foley* v. *Burnell* (2) applied, and that a tenant in tail who attained twenty-one during the life tenancy became absolutely entitled to the personalty. Lord Hatherley L.C. said (4): "I think the case of *Foley* v. *Burnell* (2) is a decision expressly in point upon this subject, and that it is quite sufficient to enable us to read this clause as one in which the testator has used the expression 'in possession' as meaning entitled to a vested estate tail in the property, though it may be vested in remainder, and the party entitled may not be in actual possession." After referring to the will in *Foley* v. *Burnell* (2) he said (5): "The Court held that what in reality the testator intended to do was this: he said, 'When any person becomes actually entitled to the full benefit and complete interest in the real estate, that same person shall from that moment

(1) 1 Bro. C. C. 285.
(2) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(3) L. R. 5 H. L. 532.
(4) Ibid. 546.
(5) Ibid. 547.

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become entitled to the heir-looms;' the distinction being not between the manual possession of the rents and profits and the holding of the estate in remainder, but between a vested interest and a contingent interest in the estate tail that was so limited." He then referred to *Marshall* v. *Holloway* (1), where Lord Eldon adverted to that distinction and spoke of cases in which the word "possession" was held not to refer to actual manual possession. Lord Westbury said (2): "There is another conclusion which forces us, I think, to come to that meaning in order to accomplish the very object of the testator. You will be good enough to recollect that in the case of a tenant in tail dying under the age of twenty-one, leaving issue, the estate is transmitted to his issue; but if you were to impose upon that tenant in tail the obligation of having actually got into possession before he had become entitled to the personal estate, the result would be the diversion of the estate. The personal estate would go one way and the real estate would go another way. And therefore you would give to those words 'in possession' a meaning that would frustrate the whole object of the testator; for it would render the receipt of the rents and profits an absolute condition of the title to the leasehold and real estate; whereas there is no such condition with regard to the real estate. And the real estate would be transmitted to the son of the tenant in tail dying whilst his estate was yet in remainder, and the personal estate having been impressed with that condition would go away to somebody else. But that is not the object. Are we to construe a will containing equivocal words so as to defeat the object of the testator, or are we to give it an interpretation consistent with the object of the testator and consistent with the meaning and intent of the whole of the clause in which the words are found? It is very easy to do so. You will construe, my Lords, these words, 'entitled to an estate tail in possession' as meaning that the tenant in tail shall have the status of being entitled to the actual pernancy of the rents and profits of the estates if the antecedent life estate were at that time defunct. And then these words are nothing in the world more than words expressive of that which will be the consequence of attaining the age of twenty-one; that the tenant in tail will become actually entitled to the rents and profits of the estate."

(1) (1818) 2 Sw. 432, 445. (2) L. R. 5 H. L. 555.

In *Vaughan* v. *Burslem* (1) the testator directed that certain chattels in a certain house "should go as heirlooms with his real estate and be held and enjoyed by" the persons for the time being entitled to his real estate "as far as the rules of law and equity will permit." Lord Thurlow followed *Foley* v. *Burnell* (2) and held that the chattels vested in an infant tenant in tail in remainder who predeceased the life tenant.

In *In re Fothergill's Estate* (3) the contrast between clauses directing "actual possession" and "possession" was exemplified. A testator bequeathed certain chattels to trustees upon trust to permit the same to be enjoyed by the person for the time being "in the actual possession or entitled to the receipt of the rents and profits" of real estates settled by his will. He also bequeathed the proceeds of sale and conversion of his residuary real and personal estate to the trustees on trust to pay the income to the person for the time being "entitled to the possession or receipt of the rents" of the settled estates. Swinfen Eady J. held that a tenant in tail who predeceased the life tenant had, subject to her interest, become absolutely entitled to the residuary estate, but not to the chattels. He said (4): "The general rule is that a gift of personalty to the persons for the time being entitled to real estate, so far as the rules of law and equity permit, vests absolutely, not in a tenant for life of the real estate, but in the first tenant in tail at birth, whether he comes into possession or not: *Foley* v. *Burnell* (2); *Lord Scarsdale* v. *Curzon*. (5) In *Cox* v. *Sutton* (6) Wood V.-C. affirmed the general rule in the clearest terms, although in that case upon the special language of that will he was able to arrive (not without difficulty) at the conclusion that the personalty was given as a contingent gift to a person who should answer a particular description at a particular date. . . . . If the gift of personal estate be to the person actually seised at the death of the tenants for life, or to the person seised of the actual freehold, which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded: *Potts* v.

(1) 3 Bro. C. C. 101.
(2) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(3) [1903] 1 Ch. 149.
(4) Ibid. 155.
(5) 1 J. & H. 40.
(6) (1856) 25 L. J. (Ch.) 845.

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Potts. (1) In this case Sugden L.C. said: 'But if a plain intention be expressed that no person shall take the chattels absolutely, who does not live to become entitled to the possession of the real estate, the Court must execute that intention.' Upon a careful consideration of the will and codicil, I am unable to find any such intention expressed in the case before me; and, as was said by Sugden L.C. in *Potts* v. *Potts* (2), 'It is firmly settled that the Court will not introduce in such cases the restrictions which conveyancers know how to introduce with apt words.'"

That being the general character of the authorities, I now come to *In re Lord Chesham's Settlement.* (3) In that case the chattels were to be "used held and enjoyed with the mansion house called Latimer" by the persons for the time being "entitled to the said mansion house." They were not to vest absolutely in a tenant in tail male by purchase who did not attain twenty-one, though he was to be entitled to the use and benefit thereof during minority. The Court of Appeal held as a question of construction that there was sufficient indication of intention that these heirlooms should go with the particular mansion house and vest only in a tenant in tail male in possession, so that a tenant in tail male in remainder who attained twenty-one but predeceased the life tenant was excluded. It is very difficult to appreciate how the Court of Appeal managed to distinguish the *Foley* v. *Burnell* (4) line of cases. The settlement had been previously considered by Chitty J. in *In re Lord Chesham.* (5) The question before him was entirely different, and, apart from the remarks of the Court of Appeal, I should have thought the decision had no bearing on the point before them. Cozens-Hardy M.R., however, said (6): "This is a case which is by no means easy, and but for the fact that this very settlement was construed by Chitty J. in the year 1886, I think I should have desired time to consider it . . . . But although that decision is not binding upon us, it seems . . . . a sound decision, and one which ought to govern the present case." He then stated the legal principle in *Foley* v. *Burnell* (4) and continued (7): "The only question . . . . is whether or not

(1) 3 J. & Lat. 353, 368; affirmed 1 H. L. C. 671.
(2) 3 J. & Lat. 369.
(3) [1909] 2 Ch. 329.
(4) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(5) 31 Ch. D. 466.
(6) [1909] 2 Ch. 333.
(7) Ibid. 334.

there is sufficient in the language of the particular instrument to satisfy the Court . . . . that it was not intended that any person should take unless he became tenant in tail in possession. . . . ." He then read the words of the trust and continued: "No person can claim . . . . under that trust unless he can say:—I am entitled to the possession and enjoyment of the mansion house and I claim . . . . the use and enjoyment of these heirlooms, not as severed heirlooms, but with the mansion house, ... as though they were freehold fixtures annexed to the mansion house in such a sense that it would be wrong for . . . . a limited owner to remove [them]. . . . . That is the view . . . . taken . . . . on this very instrument, by Chitty J." With great deference, I cannot find that Chitty J. dealt with the point at all. Cozens-Hardy M.R. then discussed *In re Lord Chesham* (1) and concluded (2): "Without infringing . . . . any . . . . principles laid down by the . . . . authorities . . . . and with great deference to Eve J., whose attention was not called to the decision of Chitty J., I think that he has taken a wrong view of this particular clause. . . . ." Farwell L.J. said (2): "I do not think there is any doubt as to the law applicable to cases of this kind. It is a mere question of the construction of a particular document. Taking the law as laid down in *Lord Scarsdale* v. *Curzon* (3), the rule is, 'First that an assignment or bequest of personalty, either immediate or by way of trust executed, to go according to the same limitations as real estate, vests it absolutely in the first tenant in tail of the realty immediately upon his birth.' Then the fourth rule is, 'Doubtful words tending to restrict the interest in the chattels to those who come into possession of the real estate, will not overrule the operation of the general canons of construction, or have the effect of suspending the interest until the time when possession of the realty is obtained.'" After referring to *Foley* v. *Burnell* (4) and *In re Fothergill's Estate* (5), Farwell L.J. read the clause he had himself to construe, and said (6): "To paraphrase that, it appears . . . . to mean this; no one shall be entitled to claim the use and enjoyment of these chattels except

(1) 31 Ch. D. 466.
(2) [1909] 2 Ch. 336.
(3) 1 J. & H. 40, 50.
(4) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(5) [1903] 1 Ch. 149.
(6) [1909] 2 Ch. 337.

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in conjunction with the mansion house Latimer, and only if and when he is entitled to the possession of that mansion house, so that he is to enjoy them in situ where alone they are intended to be enjoyed. . . . . I agree with the Master of the Rolls in thinking that we could not decide otherwise on this settlement without overruling Chitty J.'s decision." I am bound by that expression of opinion, though I am personally unable to see that Chitty J. dealt with the question all. In that case there were two mansion houses and considerble real estates, but the chattels were confined to the particular mansion house Latimer.

In *In re Parker* (1) certain chattels in a mansion house devised in strict settlement were bequeathed as heirlooms to pass with the house as if land appurtenant thereto, and to continue annexed to the house so long as the law would permit, and be inherited or enjoyed by the several persons who should succeed to the house. Parker J. held that the chattels vested absolutely in an infant tenant in tail in remainder who predeceased the life tenant. After stating the principles of the authorities he referred to *In re Lord Chesham's Settlement* (2), and said : " The form of the gift was quite different from [that] in the case I am considering, for in this case there is no reference to the use and enjoyment of the chattels with the mansion-house. They are merely directed to pass with the mansion-house, words which refer to the interests created rather than to the conditions of user."

In *In re Beresford-Hope* (3) a testator bequeathed certain chattels to his trustees " in trust to permit the same to go and be held, as far as the rules of law and equity will admit with the said Bedgebury estate " devised by his mother's will " as heirlooms " for the benefit of the persons for the time being entitled to that estate, and so that none of the chattels should vest absolutely in any tenant in tail male by purchase not attaining twenty-one. Eve J. dealt with the authorities, including *In re Lord Chesham's Settlement* (2), but held that there was nothing in the phrases " to go and be held . . . . with the said Bedgebury estate " and " for the time being " from which it would be right to infer an intention to defeat the absolute interest of the tenant in tail unless he came into actual possession.

(1) [1910] 1 Ch. 581, 587. (2) [1909] 2 Ch. 329.
(3) [1917] 1 Ch. 287.

In *In re Fowler* (1) Swinfen Eady L.J. said: "According to English law, if money or chattels are settled so as to be held and enjoyed by the persons from time to time entitled to the possession of settled real estate, they vest in the first tenant in tail immediately on birth. This result is usually obviated by a provision that they are not to vest in any tenant in tail by purchase unless he lives to attain twenty-one. It is also possible by apt words further to postpone the vesting until the estate of a tenant in tail by purchase becomes an estate in possession."

That being the state of the authorities, I have to decide whether the present heirlooms clause contains sufficiently apt words to postpone the vesting until a tenant in tail male by purchase comes into actual possession. If the language of the clause were identical with that in *In re Lord Chesham's Settlement* (2), there would be no more to be said as far as this Court is concerned. But it is not identical. In that case there were two mansion houses and the clause was confined to enjoyment at a particular mansion house. In the present case the language is practically undistinguishable from the numerous cases in which the rule in *Foley* v. *Burnell* (3) has been invariably applied. The chattels are to "go and be held and enjoyed with the said mansion house." That is a necessary and natural provision having regard to the successive life interests. This is to continue "so far as the rules of law and equity will permit." That brings in the rule of *Foley* v. *Burnell.* (3) The chattels are to be so held and enjoyed by the persons "entitled to the possession of my real estates by virtue of this my will." That means the persons entitled to the possession of the real estates generally, and I have no right, having regard to the authorities, to limit those words to actual possession; to do so would be directly contrary to *Martelli* v. *Holloway.* (4)

I have come to this conclusion with some hesitation, but on the whole I think the language of this heirlooms clause is nearer to those dealt with in the *Foley* v. *Burnell* (3) line of cases than to that in *In re Lord Chesham's Settlement.* (2) I am bound by the rule in *Foley* v. *Burnell* (3), and consequently hold that, on the true

(1) [1917] 2 Ch. 307, 325.
(2) [1909] 2 Ch. 329.
(3) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(4) L. R. 5 H. L. 532.

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construction of this clause, the chattels absolutely vested in the tenant in tail in remainder on his attaining twenty-one.

Solicitors: *Busk, Mellor & Norris; Dawson & Co., for Gibbons, Arkle & Darbishire, Liverpool; W. Silverwood Cope; Watkins, Pulleyn & Ellison, for Roberts & Evans, Aberystwith; Clarke, Rawlins & Co.*

G. R. A.

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In re LEE.

TREASURY SOLICITOR *v.* PARROTT.

[1918 L. 485.]

Donatio Mortis Causa—Registered Exchequer Bonds—Post Office Issue—Exchequer Bond Deposit Book—Delivery.

An "Exchequer Bond Deposit Book" issued by the Post Office, and containing a certificate of the holder's title to registered Exchequer bonds acquired through the Post Office, may be delivered by way of a donatio mortis causa.

In re Andrews [1902] 2 Ch. 394 distinguished.

ORIGINATING SUMMONS.

On June 1, 1917, Lee died a widower, intestate and without any known relations, and on January 23, 1918, the plaintiff took out letters of administration to his personal estate.

Lee was entitled (inter alia) to a registered 5 per cent. Exchequer bond for 100*l.* which he had acquired through the Post Office, and in respect of which he held an "Exchequer Bond Deposit Book" containing a certificate of February 5, 1916, headed "Exchequer Bond Account, No. 16,165," and certifying that he had been "registered as the holder of bonds deposited with the Post Office to the value of 100*l.*" This book and certificate, though not so stating, in fact entitled the registered holder to delivery of a bond on demand and on surrender of the book, but until that demand and surrender the bond did not actually come into physical existence, though the interest was regularly paid.

Two days before his death Lee handed the defendant Parrott (inter alia) the Exchequer Bond Deposit Book by way of a donatio mortis causa.

The Savings Bank (Investment) Regulations, 1906 (St. R. & O., 1906, No. 313), r. 27, provides that, subject to these regulations, all enactments and regulations for the time being in force relating to trustee savings banks and Post Office Savings Banks respectively shall, so far as is consistent with the tenor thereof, be construed to apply to stock standing to the credit of any depositor in a trustee savings bank or in the Post Office Savings Bank, as the case may be, "as if such stock were a deposit," and expressions referring to the deposit and withdrawal of money shall, so far as the same are applicable, be construed to include respectively investment in and sale of Government stock.

The Post Office Savings Bank Regulations, 1910 (St. R. & O., 1910, No. 569), r. 81, sub-r. 1, provides that where the whole amount due to a depositor at the time of his decease does not exceed 100*l.*, exclusive of interest, and probate of the will of such depositor is not, or letters of administration to his estate and effects are not, produced within such time as the Postmaster-General thinks reasonable, if such depositor has made no nomination, and so far as any nomination does not extend, the Postmaster-General may, without requiring probate of the will or letters of administration to the estate and effects of the deceased depositor, in his discretion pay the amount so due as aforesaid, or any part thereof, to any person who shall in the opinion of the Postmaster-General establish a valid claim to the said amount, or any part thereof, under any of the following descriptions, that is to say . . . . (*f*) A person entitled under a donatio mortis causa.

No statutory regulations governing War stock or Registered Exchequer bonds bought through the Post Office had yet been promulgated, but it was intended that the existing regulations should be made applicable thereto, and they were now being revised for that purpose. It was, however, intended that cases of donatio mortis causa under clause (*f*) should be referred to the Registrar of Friendly Societies, owing to the difficulty of ascertaining the facts in those cases.

On April 27, 1918, the plaintiff issued this summons to determine (inter alia) whether the delivery of the Exchequer Bond Deposit Book was sufficient to pass the right to the bond as a donatio mortis causa. As the next of kin were at present unascertainable, the Attorney-

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General was added to represent them as well as the Crown, claiming the bond as bona vacantia.

Austen-Cartmell for the plaintiff.

Edward Beaumont for the Attorney-General. Registered bonds do not pass by delivery, and, with the one exception that they are for short terms and definite amounts, there is no real distinction between them and ordinary Government stock. The Exchequer Bond Deposit Book is exactly analogous to the Local Loans investment certificate in *In re Andrews*. (1) It would have to be given up to the Post Office before the bond could be sold, and transfer entries would have to be made in the books. As the delivery of an investment certificate is not a good donatio mortis causa, it is extremely difficult to see how the delivery of an Exchequer Bond Deposit Book is in any better position. The subjects of donatio mortis causa are enumerated in Halsbury's Laws of England, vol. xv. p. 432.

W. A. Jolly for the defendant Parrott. In *In re Andrews* (1) there was a definite amount of Local Loans stock actually issued by the Government. Part of this stood in the name of the National Debt Commissioners, and this was used for Post Office sales and purchases, proper entries being made in the Savings Bank Investment Account of the Commissioners and in the Government Stock Register of the Savings Bank. On a purchase a definite amount of this account was allocated to the purchaser and an investment certificate issued. Kekewich J. apparently treated this as an ordinary stock or share certificate, and held that its delivery was insufficient to constitute a donatio mortis causa.

The present case is quite different. There was no purchase of existing stock. The issue of Exchequer bonds was for the time being unlimited in amount. The so-called purchaser really took up the right to a new bond. Until he demanded that bond it did not come into existence, and the only documentary evidence of his title was the Exchequer Bond Deposit Book containing the certificate. The delivery of this book was all that was possible in the circumstances, and the donor's legal personal representatives are trustees for the donee: *In re Dillon* (2), following *Duffield* v. *Elwes*. (3)

(1) [1902] 2 Ch. 394.
(2) (1890) 44 Ch. D. 76, 82, 83.
(3) (1827) 1 Bli. (N.S.) 497, 530, 534, 543.

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Edward Beaumont in reply. The dividends on registered Exchequer bonds are regularly paid, so presumably there is some record of the transaction either at the Bank of England, or at all events in the Post Office books. The fact that there is no physical paper bond in existence is immaterial, if the right to that bond is properly recorded. The Exchequer Bond Deposit Book bears a far greater resemblance to the investment certificate in *In re Andrews* (1) than it does to the mere banker's deposit note in *In re Dillon* (2), and its delivery cannot constitute a good donatio mortis causa.

ASTBURY J. (after stating the facts). The decision of Kekewich J. in *In re Andrews* (1) comes somewhat near the question I have to decide. In that case Kekewich J. held that "The delivery of a Post Office Savings Bank Deposit Book may constitute a good donatio mortis causa of the balance standing to the credit of the depositor; but where a deposit is invested by the Post Office Savings Bank for the depositor in Government stock under the regulations contained in the deposit book by having the stock placed on the Savings Bank Investment Account of the National Debt Commissioners and credited to the depositor, the delivery of the investment certificate and the deposit book cannot constitute a good donatio mortis causa of the Government stock."

In that case, however, the stock had been purchased or segregated for the benefit of the depositor, which prevents the decision really being upon all fours with the present case. The matter is of some consequence, because a large number of these small holdings are acquired through the Post Office, and one would desire, if possible, that the issued regulations of the Post Office with regard to similar holdings should so far as possible be followed, no statutory regulations as to the 5 per cent. Exchequer bonds having yet been issued. [His Lordship read the regulations of 1906 and 1910.]

In the present case the owner of the right to this Exchequer bond deposited by way of gift the only document of title that existed with regard to the bond, and there was no bond either handed over to the Post Office or otherwise segregated in connection with this transaction at all. That is quite sufficient to differentiate the case from *In re Andrews* (1), which is difficult to reconcile with the

(1) [1902] 2 Ch. 394. (2) 44 Ch. D. 76, 82, 83.

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judgments of the Court of Appeal in *In re Dillon.* (1) In the latter case the testator, who held a banker's deposit note for 580*l.*, handed it over immediately prior to his death, and it was held that a good donatio mortis causa thereby took place. Cotton and Lindley L.JJ. explained very clearly what they understood to have been decided by the House of Lords in *Duffield* v. *Elwes* (2), namely, that there may be a good donatio mortis causa of an instrument not passing by delivery, and that the donor's executors are trustees for the donee for the purpose of giving effect to the gift. That applies in substance to this Exchequer bond in the circumstances I have mentioned. The delivery of the Exchequer Bond Deposit Book was therefore a good donatio mortis causa.

Solicitors: *Treasury Solicitor; Church, Adams, Prior & Balmer, for Arthur E. Withy, Bath.*

G. R. A.

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[1918 S. 868.]

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[1918 B. 920.]

BURNS *v.* SIEMENS BROTHERS DYNAMO WORKS, LIMITED.

[1918 B. 1043.]

Company—Debentures—Trust Deed—Specifically mortgaged Premises—Shares in another Company standing in Trustees' Names—Right of Voting—Articles of Association—General Meeting—Shares standing in Joint Names—Right to demand Poll—Alteration of Register by dividing Shares—Interlocutory Application.

Where a company makes an issue of debenture stock which it secures by a debenture trust deed, and as part of the specifically mortgaged property causes shares in another company to be registered in the names of the trustees of the deed, the trustees are, in the absence of any contract restricting their rights, entitled, as the

(1) 44 Ch. D. 76, 82, 83. (2) 1 Bli. (N.S.) 497, 530, 534, 543.

legal owners of the shares, to exercise the voting rights in respect of them in such manner as in their judgment they may deem best, irrespective of any directions of the mortgagor company as to how the voting rights should be exercised, and this, notwithstanding that the security is not yet enforceable.

Where articles of association give a right to demand a poll to "members holding" at least a specified number of shares, joint holders of the specified number of shares may demand a poll without the support of any other member.

Decisions of Astbury J. on these points affirmed.

A. and B. applied by motion for an order directing the company to transfer one half of the shares standing in their joint names into the names of A. and B. and the other half into the names of B. and A. The Court made the order. On appeal:—

Held (reversing the decision of Astbury J.), that the matter was not one which ought to be dealt with on an interlocutory application, and that the order must therefore be discharged.

APPEALS from decisions of Astbury J.

Siemens Brothers & Co., Limited (hereinafter called the Siemens Company), was incorporated under the Companies Acts, 1862 to 1880, on December 28, 1880, for the purpose of acquiring and continuing to carry on the business of a firm called "Siemens Brothers" as engineers, electricians, contractors, merchants, manufacturers, and traders.

In 1900 the Siemens Company made an issue of 300,000*l.* 4 per cent. debenture stock, of which, having regard to certain subsequent arrangements, only 150,000*l.* were now outstanding or capable of issue. The debenture stock was secured by a debenture trust deed dated June 27, 1900, and made between the Siemens Company of the one part and Walter Spencer Morgan Burns and Quintin Hogg as trustees for the stockholders of the other part.

By the interpretation clause (clause 1), "the specifically mortgaged premises" were defined to mean "the leasehold hereditaments by clause 9 hereof expressed or covenanted to be assured and all other property hereby made a specific security for the payment of the moneys for the time being owing and intended to be secured hereunder."

By clause 9, "The company as beneficial owner hereby demises unto the present trustees the hereditaments and premises specifically referred to in the second schedule hereto . . . . The company hereby further agree that they will convey to the trustees within

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one calendar month of their acquiring the same all freehold, copyhold and leasehold hereditaments and premises acquired by them as part of the assets of the company to be held by the trustees as part of the specifically mortgaged premises." The hereditaments and premises therein referred to were certain leasehold premises at Woolwich upon which the Siemens Company carried on its business.

Clause 10: "The company hereby charges in favour of the trustees or trustee all other the assets and undertaking for the time being of the company both present and future other than its uncalled capital (if any) with the payment of all moneys for the time being owing on the security of these presents and such charge shall rank as a floating charge."

Clause 11: "The trustees or trustee shall permit the company to hold and enjoy the mortgaged premises and to carry on thereon and therewith the business or any of the businesses mentioned in the memorandum of association of the company until the security hereby constituted shall become enforceable as hereinafter provided . . . ."

Clause 19: "At any time before the security hereby constituted becomes enforceable the trustees or trustee may upon the application and at the expense of the company but only if and so far as in their or his opinion the interest of the stockholders shall not be prejudiced thereby do or concur in doing all or any of the things following in respect of the specifically mortgaged premises that is to say:—

. . . . . .

"(6.) May assent to the modification of any contracts or arrangements which may be subsisting in respect of any of the specifically mortgaged premises and in particular the terms of any leases or covenants and may accept the surrender of any lease or leases.

. . . . . .

"(11.) May permit the company or any nominee of the company to exercise any powers and rights incident to the ownership of any of the specifically mortgaged premises and in particular any voting right. . . . ."

Clause 20: "All net moneys arising from any dealings under the last preceding clause and all property and assets acquired pursuant to that clause shall become and be part of the specifically mortgaged premises and shall be paid to or vested in the trustees or trustee accordingly. And the trustees or trustee shall be bound

from time to time and at any time to concur with the company in any sale lease exchange or other disposition of or dealing with any of the specifically mortgaged premises provided (*a*) that the company shall in writing request such concurrence and (*b*) that the company shall furnish the trustees or trustee with evidence sufficient in the opinion of the trustees or trustee to show that the proposed dealing is expedient in the interests of the company and the stockholders."

The first schedule to the deed, which contained the conditions as to the issue of the debenture stock, provided (inter alia) (clause 2): "The stock is only to be redeemable or repayable as follows that is to say:—(*a*) The company may at any time and from time to time give to the stockholders not less than six calendar months' notice of its intention to redeem on or at any time after the 1st day of March 1910 the stock held by them respectively. (*b*) At the expiration of such notice such stock shall be redeemed at the rate of 105*l.* for each 100*l.* of stock."

At the date of this deed no part of the security vested in the trustees consisted of shares in any company.

The Siemens Company subsequently acquired freehold property at Stafford upon which it opened a branch of its business for the manufacture of dynamos, which became known as the dynamo branch of the Siemens business, and this property and business, by reason of the trusts of the deed, became included in the general charge in favour of the original trustees.

In 1906 the Siemens Company resolved to form a separate company to carry on the dynamo business. Accordingly a new company was incorporated under the Companies Acts, 1862 to 1900, on May 25, 1906, under the name of Siemens Brothers Dynamo Works, Limited (hereinafter called the Dynamo Company), and by an agreement dated June 19, 1906, the Siemens Company agreed to sell their works at Stafford to the new company for 200,000*l.* debenture stock and 20,000 shares in the new company.

By an agreement of the same date made between the Siemens Company of the one part and W. S. M. Burns and C. E. Hambro, who were then the debenture trustees (Hogg having died), of the other part, supplemental to the deed of June 27, 1900, after reciting the opening of the dynamo branch and that it had been arranged that in future it should be carried

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on as a separate undertaking by the Dynamo Company, and that in consideration of the transfer by the Siemens Company to the Dynamo Company the latter had agreed to issue to the vendor company 200,000*l.* in debentures and to allot to the vendor company in substance the whole of the share capital of the Dynamo Company, it was agreed that the Siemens Company should nominate debenture trustees to receive from the Dynamo Company the 200,000*l.* debenture stock and procure the registration in the name of the trustees of the whole of this share capital in the Dynamo Company. Clause 2 provided that the trustees should hold the debentures and the shares upon the trusts and with and subject to the powers and provisions declared by and contained in the trust deed and as part of the specifically mortgaged premises therein included. Clause 3 provided that if the Siemens Company should by a request in writing give notice to the trustees at any time during the term of fifteen years from January 1, 1906, of their desire to purchase the same the trustees should sell and transfer, or cause to be sold and transferred, to the Siemens Company, or as they should direct, these shares or any part of them.

In pursuance of this agreement the debenture stock was issued, and 19,993 shares, being the whole of the share capital of the Dynamo Company with the exception of the seven shares held by the signatories to the memorandum, were either allotted or transferred to the trustees and registered in their joint names, the name of Mr. Burns standing first in the register of members.

The original articles of association of the Dynamo Company provided :—

Article 1 : " In the interpretation of these presents the following words and expressions have the following meanings unless excluded by the subject or context :—

. . . . . .

(*q*) Words importing the singular number only include the plural number and vice versa . . . ."

Article 142 : " Subject to a poll being demanded as hereinafter mentioned, or to the chairman requiring that a poll be taken, as he shall have authority to do on every question other than the adjournment of the meeting, every question to be decided by any general meeting, unless resolved on without a dissentient and in case it

shall not be otherwise laid down by the statutes, shall be decided by a simple majority of the members personally present thereat, and qualified according to these presents to vote, by way of show of hands."

Article 143: "At any general meeting, unless a poll on any resolution thereof be demanded by at least two members, immediately on the declaration by the chairman of the meeting of the result of the show of hands thereon or before the dissolution or adjournment of the meeting by a written requisition signed by members holding or representing by proxy together at least 300 shares, and delivered to the chairman or secretary, or unless the chairman require that a poll be taken, a declaration by the chairman that a resolution is carried, and an entry to that effect in the minutes of the proceedings of the meeting, shall be sufficient evidence of the fact so declared, without proof of the number or proportion of the votes given for or against the resolution."

Article 147: "If more persons than one are jointly entitled to a share, the person whose name stands first in the register of members, as one of the holders of the share, and no other, shall be entitled to vote in respect thereof."

Article 150: "A member entitled to vote may, from time to time, appoint any other member entitled to vote as his proxy in voting at any poll . . . ."

Recently the constitution and membership of the Siemens Company had undergone a considerable modification. The shares were formerly held largely by Germans, but under the Trading with the Enemy Act these had become vested in the Public Trustee. The Board of Trade had required the articles of both companies to be altered in order to prevent their shares coming into German hands.

A new set of articles of association of the Dynamo Company had accordingly been prepared, and contained provisions to which the trustees were not willing to assent.

On April 9, 1918, the trustees served a notice on the directors of the Dynamo Company requiring them to transfer one half of the number of the shares held by them into the names of Burns and Hambro and the other half into the names of Hambro and Burns. This the directors refused to do. They also required that clauses should be inserted in the proposed new articles enabling them to

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nominate a director, but the Dynamo Company also refused to do this.

The Dynamo Company called a meeting of the shareholders of the company to be held on May 10, 1918, to pass a resolution adopting the new articles.

On May 3, 1918, the trustees issued a writ against the Dynamo Company for a declaration that the register of members should be altered by transferring one half of the shares registered in their joint names into the name of Burns and Hambro and the other half into the names of Hambro and Burns, and for an injunction restraining the company from holding the meeting until this was done.

The Siemens Company, not being a party to this action, on May 8, 1918, issued a writ against the trustees for an injunction restraining them from dealing with their shares or voting except as directed by the Siemens Company.

On May 10, 1918, motions in both actions were mentioned to Astbury J., and it was arranged that the meeting of May 10 should be adjourned until the motions had been disposed of. The motions accordingly stood over until May 14, when they were heard by Astbury J., who, relying on clause 19, sub-clause 11, of the trust deed, refused to make any order on either motion.

On May 17, 1918, the adjourned meeting of the Dynamo Company was held for the purpose of passing a resolution adopting the proposed new articles. At this meeting the seven signatories to the memorandum voted in favour of the resolution and Burns, as the trustee who was first named in the register, against it. A poll was thereupon demanded in writing signed by both the trustees, which was refused, and the resolution was declared by the chairman to be carried.

On May 18, 1918, the trustees issued a writ against the Dynamo Company asking for a declaration that the poll was properly demanded and for an injunction restraining the company from holding the confirmatory meeting.

On May 28, 1918, the trustees moved for the relief claimed in their actions. Astbury J., by consent, treating the motion to rectify the register as being still before him, made an order in both actions directing the register to be rectified in the manner asked for by the

trustees and restraining the Dynamo Company from holding the confirmatory meeting except for the purpose of adjournment.

The Siemens Company and the Dynamo Company respectively appealed from the orders made against them. The three appeals were heard together on June 10, 1918.

Gore-Browne K.C. and *Percy Wheeler* for the Siemens Company and the Dynamo Company. 1. Where there is a clause in a debenture trust deed, as in this case, entitling the company to carry on its business until default, the trustees can only vote, in respect of shares vested in them, in accordance with the directions of the mortgagor company. Voting in respect of shares is carrying on the business of the company, which by clause 19 of the trust deed the Siemens Company are entitled to do. Reliance is placed by the trustees on sub-clause 11 of clause 19, which empowers them to permit the company to exercise any voting right in respect of the mortgaged premises. But it is submitted that that power was not intended to be an exclusive power. As long as no default is made by the company under the deed the trustees cannot interfere with the conduct of the business of the Dynamo Company. Until default is made by the Siemens Company the trustees are trustees for the mortgagor company, and it is only after default that they become trustees primarily for the stockholders. The discretion as to how the business is to be carried on is left to the company. The protection afforded to the trustees arises from the fact that the company in carrying on its business will not do anything to injure it. The trustees are fully secured without reference to these particular shares. It is submitted, therefore, that the trustees should not interfere in the voting of the Dynamo Company in any way contrary to the wishes of the Siemens Company. The trustees are undoubtedly interested in the carrying on of the business of the company, but they have agreed by the trust deed to leave it in the hands of the Siemens Company.

2. As regards the alteration of the order of names in the register of members, the only obligation of a company under s. 25 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), is to enter in the register the names, addresses and occupations of members, and the date at which each person was entered in the register as a member.

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Where shares are held in joint names members may state the order in which they desire to have them entered at the time when they send them in to the company for registration : *In re T. H. Saunders & Co.* (1) When once the names are entered in the register members cannot require the company to alter the order. It would be an intolerable nuisance for a company to have constantly to alter its register. A person who comes into Court and asks for an order must show that he has an enforceable right to it. It is not sufficient for him merely to show that such an order would be convenient to him. Sect. 32 of the Act of 1908 shows the grounds on which the Court can order the register to be rectified.

3. As to demanding a poll. This depends upon s. 69 of the Act, which defines an extraordinary and special resoluti n and states when a poll may be demanded. The section provides (sub-s. 4) that a poll can only be demanded by a person who is entitled according to the articles to vote. The question here is whether a poll has been demanded in accordance with s. 69. It is submitted that here the effect of the articles is to provide that a poll can only be demanded by two members who are entitled to vote. Article 143 seeks to comply with the Act. For the purposes of that article each of the two joint holders of a share is not regarded as a separate person : *Cory* v. *Reindeer Steamship, Ld.* (2)

[SWINFEN EADY M.R. Do you say that a poll can only be demanded under s. 69, sub-s. 4 ?]

Yes. Sect. 69 must be looked at to see what a special resolution is. That is strictly defined. The section states how a poll is to be demanded. If Mr. Hambro is not entitled to vote, then, it is submitted, he does not come within s. 69.

Hon. Frank Russell K.C. and *H. E. Wright* for the trustees. If the Court is in favour of the trustees on the questions as to voting in respect of the shares and the demand for a poll, the trustees are not anxious as to the question of altering the order of their names in the register.

[SWINFEN EADY M.R. We will not trouble you on the first two points. As regards the third point, it is not the practice of the Court to grant substantive relief on an interlocutory application.]

(1) [1908] 1 Ch. 415, 423. (2) (1915) 31 Times L. R. 530.

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SWINFEN EADY M.R. These are three appeals from three separate orders. The first appeal is one which raises this question: Whether the defendants Messrs. Burns and Hambro, who are the present trustees of a debenture trust deed, and as such are the registered holders of certain shares in the Dynamo Company, are bound to vote in respect of their shareholding as the Siemens Company directs, or, if it is not put so high as that, whether they can be restrained from exercising their voting power so that they may not use it adversely or in a way to which the Siemens Company do not consent.

The Siemens Company was formed in the year 1880, and in the year 1900 made an issue of debenture stock secured by a trust deed of which Messrs. Burns and Hambro are the present trustees. The stock was part of a proposed issue of 300,000*l.* stock, but only 150,000*l.* of that stock has been issued, and, having regard to what has happened since, there will be no further issue of that stock. Therefore we may treat the trustees as being trustees of an issue of 150,000*l.* 4 per cent. debenture stock. The debenture trust deed contains a power to the Siemens Company to pay off the stock on six months' notice at 105*l.* Having regard to the fact that the stock is only a 4 per cent. stock, and naturally now stands at a considerable discount in the market, it would not be reasonable to expect that the Siemens Company would, as things stand at present, treat it as a commercial proposition to pay off this debenture stock at a premium of 105*l.* for each 100*l.* of stock. The debenture trust deed draws a distinction between certain property, leasehold property, specifically mortgaged and constituting a specific security, and other property comprised in the charge, which is subjected only to a floating charge. The deed describes the specifically mortgaged premises as meaning "the leasehold hereditaments by clause 9 hereof expressed or covenanted to be assured and all other property hereby made a specific security for the payment of the moneys for the time being owing and intended to be secured hereunder." So that there comes within the description in the deed of the "specifically mortgaged premises" not only the leasehold hereditaments, but all other property by the deed made a specific security. There is other property which by the deed is made a specific security.

The deed then provides, by clause 9, that the company further

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agree that they will convey to the trustees " within one calendar month of their acquiring the same all freehold, copyhold and leasehold hereditaments and premises hereafter acquired by them as a part of the assets of the company to be held by the trustees as part of the specifically mortgaged premises." The company subsequently acquired certain premises at Stafford for the purpose of manufacturing dynamos ; that was a branch added to their business, and the premises in Stafford were additional premises which were comprised in and covered by this covenant to convey them to the trustees as part of the specifically mortgaged premises. Those additional premises were not in fact conveyed to the trustees, although they became subject to the covenant. What happened was this: The deed contained full provision (clause 20) for the trustees at the request of the company joining in any sale of any of the specifically mortgaged premises, and they may sell them or let them or exchange them, and may generally deal with the property specifically mortgaged as the company wish so far as in the opinion of the trustees the interest of the debenture stock holders will not be prejudiced thereby.

Some time in the year 1906 it was thought expedient that the additional premises at Stafford, together, as I understand, with the London office at Westminster used in connection with the dynamo works, should be sold and conveyed to a new company, which was referred to in these proceedings as the Dynamo Company, and on May 25, 1906, the Dynamo Company was incorporated. The premises, the works, the plant, and the assets relating to the dynamo business were sold and conveyed and transferred to the Dynamo Company, and by way of payment the Dynamo Company issued 20,000 fully-paid shares of 10*l.* each and 200,000*l.* of debentures. All these shares save the seven for the seven signatories to the memorandum, that is to say, 20,000 shares less seven, and all the debentures were issued to the debenture trustees, Messrs. Burns and Hambro. The shares were registered in the names of the trustees, the name of Mr. Burns standing first in respect of the whole block—that is to say, the whole of the 20,000 shares of 10*l.* each less seven shares. Clause 20 of the trust deed provided that " All net capital moneys arising from any dealings under the last preceding clause " —that is, any dealings with the specifically mortgaged premises—

"and all property and assets acquired pursuant to that clause shall become and be part of the specifically mortgaged premises and shall be paid to or vested in the trustees or trustee accordingly. And the trustees or trustee shall be bound from time to time and at any time to concur with the company in any sale, lease, exchange or other disposition of or dealing with any of the specifically mortgaged premises provided (*a*) that the company shall in writing request such concurrence, and (*b*) that the company shall furnish the trustees or trustee with evidence sufficient in the opinion of the trustees or trustee to show that the proposed dealing is expedient in the interests of the company and the stockholders." The result, therefore, is that the shares and the debentures in the Dynamo Company became vested in the trustees of this deed as part of the specifically mortgaged premises. Clause 19 of the deed provides that " At any time before the security hereby constituted becomes enforceable "—and there is no suggestion that the security has become enforceable, because the company has duly paid the interest and observed and performed the provisions of the deed—" the trustees or trustee may upon the application and at the expense of the company but only if and so far as in their or his opinion the interests of the stockholders shall not be prejudiced thereby do or concur in doing all or any of the things following in respect of the specifically mortgaged premises, that is to say "; and then one of them, sub-clause 6, is: " May assent to the modification of any contracts or arrangements which may be subsisting in respect of any of the specifically mortgaged premises and in particular the terms of any leases or covenants, and may accept the surrender of any lease or leases "; and sub-clause 11: " May permit the company or any nominee of the company to exercise any powers and rights incident to the ownership of any of the specifically mortgaged premises, and in particular any voting right."

Now we have some criticism upon the language of the phrase " and in particular any voting right," especially in respect of the instrument where the specifically mortgaged premises conveyed and assured by the instrument were certain leasehold hereditaments; but it will be observed that the instrument itself contemplates the addition of other property, and it refers to the other future property which is by the deed made a specific security, and says that that

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future property shall be included in the term "the specifically mortgaged premises"; and it is manifest that these debentures and shares, issued by the Dynamo Company, are not only specifically mortgaged premises within the meaning of the deed, but that it was contemplated at the time the deed was executed that future acquired property would come into the trust in that way and be held as and form part of the specifically mortgaged premises; and therefore the provisions of the deed are wide enough to extend to and include property which it was in the contemplation of the parties at the time the deed was executed would be brought into the security. It cannot be doubted that this provision in sub-clause 11 of clause 19 extends to any voting right in respect of the shares in question. These shares are specifically mortgaged premises, and the provision that the trustees may permit the company, or any nominee of the company, to exercise any powers and rights incident to the ownership of any of the specifically mortgaged premises, and in particular any voting right, has this operation, that it shows that there was an express agreement between the parties as to the extent to which, if at all, the company was to exercise or have the benefit of any voting rights in respect of the shares. In the ordinary way, where shares are transferred to and registered in the name of a mortgagee it follows, from his position as owner at law of the shares, that the ownership carries with it the voting right, that this is vested in the owner of the shares; and it would require a contract to exclude that right. Sometimes, where shares form a security, there is a contemporaneous collateral agreement as to the mode in which, and the extent to which, voting rights in respect of the shares shall be exercised. But in the absence of any such agreement the voting rights would be with the legal owners of the shares, and it would require a contract to control the exercise of those rights. The present case does not even stop there, because the contract itself shows that the mortgagor company was only to have voting rights so far as the trustees for the debenture-holders permitted them to have them. The words of clause 19, sub-clause 11, are: "May permit the company . . . . to exercise . . . . in particular any voting right"; and, except so far as the trustee mortgagees permit the company to exercise the voting right, I am of opinion that such right remains vested in the debenture trustees

to be exercised by them primarily for the benefit of the stockholders. Then it was urged that the effect of this would be to contravene the provisions of clause 11 of the trust deed, because that clause provides that "The trustees or trustee shall permit the company to hold and enjoy the mortgaged premises and to carry on thereon and therewith the business or any of the businesses mentioned in the memorandum until the security shall become enforceable." In my opinion, the fact that the trustees exercised voting rights in respect of the shares in the Dynamo Company does not in any way interfere with the company enjoying the mortgaged premises and carrying on thereon and therewith the business or businesses mentioned in the memorandum which are the business or businesses of the Siemens Company, and not the business of the Dynamo Company. It is, in my judgment, no breach whatever of this clause for the debenture trustees to insist that the voting in respect of the shares rests with them, and that they are entitled to exercise the voting power. Under these circumstances I am of opinion that the learned judge in the Court below was right in refusing to make any order, and that this Court will be right in refusing to make any order, the effect of which would be, according to the notice of motion, to prevent the trustees from voting in respect of the shares in the Dynamo Company held by them as part of the security for the debenture stock otherwise than in accordance with the directions of the Siemens Company. In my opinion the trustees are entitled to exercise their voting rights as in their judgment they may deem best, irrespective of any directions of the Siemens Company as to the way in which their votes are to be recorded.

In my judgment, therefore, the appeal from the order on that motion fails.

Then the next matter is this: The debenture trustees by an action brought by them seek to have it declared that a resolution purporting to be passed at a recent meeting of the Dynamo Company was not validly passed as an extraordinary resolution and cannot be confirmed so as to make it a special resolution. That depends upon whether a poll has been duly demanded by the trustees at the meeting. That turns upon the construction of article 143. At the meeting convened to pass the first part of the special resolution there were present Mr. Burns, the holder of 19,993 shares, and the other

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seven shareholders, and by a document in writing, a requisition signed by Mr. Burns and Mr. Hambro, a poll was demanded. If the poll was duly demanded, then it is clear that the resolution was not passed. That depends, as I say, upon the true construction of article 143. [His Lordship read the article and continued :] Now the written declaration was delivered to the chairman or secretary before the dissolution or adjournment of the meeting, and it was signed by Mr. Burns and Mr. Hambro. Is it sufficient within this article ? In my opinion it is, because, as I read the article, a written requisition need only be signed by a member or members holding or representing by proxy together at least 300 shares. The language of the article is by a written requisition signed by members holding the minimum number of shares—300. But by the definition clause contained in the articles (article 1 (*q*)), "Words importing the singular number only, include the plural number and vice versa"—that is to say, they include it where the context so requires or permits. The written requisition signed by members referred to in article 143 is, in my opinion, satisfied if the requisition is signed by a member or members together holding or representing by proxy at least 300 shares. Here this requisition was signed by two members, and it was signed by a member entitled to vote holding upwards of 300 shares. In my opinion, on the true construction of this article, the requisition was validly signed and was sufficient for the demand of a poll. That being so, the meeting, the first of the two meetings to pass and confirm a special resolution, did not pass the resolution validly by a show of hands when a poll was demanded. The result, therefore, is that there should be an injunction until judgment or further order restraining the Dynamo Company from acting upon the resolution passed at the first meeting. That disposes of the first two motions.

With regard to the third question, as to registering a portion of the shares that now stand in the names of the two trustees by transposing the order of their names as regards one moiety of their shares, it is not a matter which ought to be dealt with on an interlocutory application, and the proper course will be to discharge the order on that motion and make the costs of the appeal and the costs in the Court below costs in the action.

With regard to the other two motions, the appeals must be dismissed with costs.

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DUKE L.J. My brother Scrutton has asked me to say that he agrees in the judgment that has just been delivered by the Master of the Rolls. I also agree and have nothing to add.

Solicitors: *Roney & Co.; Bircham & Co.*

W. I. C.

HOSACK *v.* ROBINS (No. 2).

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[1917 H. 802.]

Bankruptcy—Undischarged Bankrupt—After-acquired Property—Transaction for Value—Charging Order on Shares—Validity against Trustee—Judgments Act, 1838 (1 *&* 2 *Vict. c.* 110), *s.* 14—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 44—*Bankruptcy and Deeds of Arrangement Act*, 1913 (3 *&* 4 *Geo.* 5, *c.* 34), *s.* 11—*Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 47.

In 1912 an undischarged bankrupt became entitled to certain shares in a limited company. On April 25, 1913, the plaintiff recovered judgment against the bankrupt for 62*l.* and costs, and on June 13, 1913, he obtained a charging order absolute under the Judgments Act, 1838, s. 14, on the bankrupt's interest in the shares, subject to any lien the company might have on them. In February, 1916, the official receiver, as trustee in the bankruptcy, intervened and seized and sold the shares, subject to all proper charges thereon. On an application by the plaintiff to enforce his charging order against the holders of the shares and a subsequent incumbrancer:—

Held (reversing the decision of Astbury J.), that the charging order was not equivalent to a transaction for value within the proposition stated by Lord Esher in *Cohen* v. *Mitchell* (1890) 25 Q. B. D. 262, 267, and was therefore invalid against the trustee, and that the plaintiff was therefore not entitled to enforce the charging order.

Held, also, that if the question had arisen under the Bankruptcy Act, 1914, the charging order could not have been sustained against the trustee in bankruptcy under s. 47 of that Act, which embodied the proposition stated in *Cohen* v. *Mitchell*.

APPEAL from a decision of Astbury J.

On January 11, 1894, one Shanks became a bankrupt. In 1912 while still undischarged he became entitled to 326 shares in Ayre

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& Kingcome, Limited, of which 26 were registered in his name and 300 in the name of Ayre as his nominee.

On April 25, 1913, the plaintiff recovered judgment against Shanks for 62*l.* 5*s.* and costs, and on May 16, 1913, he obtained a charging order nisi and on June 13, 1913, a charging order absolute on Shanks' interest in the 326 shares subject to any lien or charge the company might have on the 300 shares part thereof.

In February, 1916, the official receiver, as trustee in the bankruptcy, intervened and seized and sold the shares to Kingcome and his nominees Robins and Clelland, subject to all proper charges thereon. One share was thereupon transferred to the defendant Robins, 25 to the defendant Clelland, and 300 to Kingcome. Kingcome subsequently transferred the 300 shares as follows, namely, 84 to the defendant Hickley, 107 to the defendant Underwood, one to the defendant Law, and 108 to the defendant Balding, and this was the present state of the register.

On February 14 and 16, 1916, in reply to inquiries made by the plaintiff, the assistant official receiver wrote stating that the official receiver sold his interest in the shares in question subject to all proper charges thereon.

On June 18, 1917, the plaintiff by leave of the Court issued an originating summons against the holders of the shares and a subsequent incumbrancer to enforce his charging order.

On January 15, 1918, the company, which in fact held all the certificates, was added as a defendant.

The summons was heard before Astbury J. on April 25, 1918.

At the hearing it was admitted that the company had a prior lien for an amount, not yet ascertained, on the 300 shares, and that they had no lien on the 26 shares, so that the effect of the charging order as against the personal defendants had alone to be decided.

Astbury J., after pointing out that *In re O'Shea's Settlement* (1) was not a case relating to after-acquired property and had no bearing on the present case, said that the only question was whether a charging order under the Judgments Act, 1838, s. 14, was a transaction for value within *Cohen* v. *Mitchell.* (2) If, prior to his trustee's intervention, the bankrupt had charged the shares in favour of the plaintiff, though for a past debt, the Court would have inferred a

(1) [1895] 1 Ch. 325. (2) 25 Q. B. D. 262.

request for forbearance by way of consideration (*Glegg* v. *Bromley* (1)) and the charge would have been valid against the trustee. Sect. 14 in effect put the plaintiff in the same position as if such a charge had been made, and the same inference followed. His Lordship accordingly held that the plaintiff was entitled to enforce the charging order subject only to the company's lien.

The defendants other than the company appealed.

Tomlin K.C. and *Percy Wheeler* for the appellants. If the bankrupt had given the plaintiff a charge in consideration of a present advance, or even in consideration, express or implied, of forbearance in abstaining from the immediate enforcement of the past debt, there would have been an unimpeachable transaction within *Cohen* v. *Mitchell* (2) and *In re Bennett.* (3) But that has no application to the present case. The bankrupt did nothing. The charging order was a mere proceeding in invitum as a step towards further proceedings. No request for forbearance can therefore be inferred. The respondent contends that he is in the same position as if the bankrupt had given him a charge. But s. 14 of the Judgments Act, 1838, does not mean that "the creditor is to be deemed to be a person in whose favour such an agreement to charge has been made": *In re O'Shea's Settlement.* (4) In that case it was held that a charging order was not a dealing or transaction by or with the bankrupt within s. 49 of the Bankruptcy Act, 1883. A charging order therefore, being a mere proceeding in invitum, is not a dealing or transaction by the bankrupt at all, still less a dealing or transaction for value within the proposition laid down by Lord Esher in *Cohen* v. *Mitchell.* (5) That case is therefore inapplicable, and the plaintiff's charging order cannot prevail against the trustee or his assignees. Sect. 47 of the Bankruptcy Act, 1914, which re-enacts s. 11 of the Bankruptcy and Deeds of Arrangement Act, 1913, is a statutory recognition of the proposition laid down in *Cohen* v. *Mitchell* (5): *Hill* v. *Settle.* (6) It is not now open to question that a charging order is not within s. 47 of the Act of 1914.

Some reliance was placed by the respondent on *In re*

(1) [1912] 3 K. B. 474, 481.
(2) 25 Q. B. D. 262.
(3) [1907] 1 K. B. 149.
(4) [1895] 1 Ch. 325, 331.
(5) 25 Q. B. D. 262, 267.
(6) [1917] 1 Ch. 319.

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Leavesley (1), but the language of Lindley L.J. in that case is conclusive in showing that there can be no such thing as implied valuable consideration. The case does not therefore assist the respondent. The appellants do not dispute the company's lien.

Meyrick Beebee and *Harold Simmons* for the respondent. The shares were acquired by the bankrupt after the bankruptcy. He could deal with them for value before the trustee intervened. He was in the position of the trustee's agent ad hoc, so that notice of the bankruptcy was immaterial: *Cohen* v. *Mitchell.* (2) Here, it is submitted, the trustee intervened to seize the equity of redemption only in the shares. He did nothing to impeach the respondent's charge. The trustee sold the shares subject to all proper charges.

[WARRINGTON L.J. It would be contrary to the duty of the official receiver, as trustee, to sell subject to a charge which did not bind him.]

The trustee never intervened in the sense of seizing the shares freed from the charge. It was open to him to intervene or not as he chose. He was not bound to do so. He was not bound to challenge the charge. The proposition laid down by Lord Esher in *Cohen* v. *Mitchell* (2) is not exhaustive of all the transactions by a bankrupt with regard to his after-acquired property which are binding on the trustee. If it were so, it would no doubt be difficult to maintain that this charge was a dealing or transaction by the bankrupt within it. The view taken by the judge in the Court below was that the proposition was not exhaustive. In *Cohen* v. *Mitchell* (2) the Court had not to consider the case of an execution or a charging order.

[SWINFEN EADY M.R. referred to *Ex parte Pillers.* (3)]

Sect. 11 of the Bankruptcy and Deeds of Arrangement Act, 1913, which is re-enacted by s. 47 of the Bankruptcy Act, 1914, did not merely adopt the proposition in *Cohen* v. *Mitchell.* (2) It is inaccurate to say that the Acts of 1913 and 1914 merely codified the existing law. The Act of 1913 was passed to amend, and not to consolidate, the law, and did by s. 11 amend the law relating to the title of the trustee in bankruptcy as regards after-acquired property by

(1) [1891] 2 Ch. 1, 6. (2) 25 Q. B. D. 262, 267, 269.
(3) (1881) 17 Ch. D. 653.

extending the law as laid down in *Cohen* v. *Mitchell* (1) to real estate, to which it did not previously apply: *In re New Land Development Association and Gray.* (2) The present transaction is governed by the Bankruptcy Act, 1883, and the Court has had to put some gloss on the provisions of s. 44 of that Act as to after-acquired property in order to make them workable. To prevent the bankrupt being made the slave of the trustee, as suggested in *Cohen* v. *Mitchell* (3), the Court must have some regard to proceedings in invitum.

Whether or not the trustee has intervened is a question of fact. In some cases, as in *In re O'Shea's Settlement* (4), the intervention is unequivocal. Whether the trustee intervened in the present case is a matter of inference.

[DUKE L.J. We have here copies of the transfers of the shares. How could the trustee have intervened more effectively?]

The inference from the disparity between the price paid for and the value of the shares is that they were sold subject to the respondent's charge. They were sold by the trustee subject to all proper charges. The respondent's charge was a lawful and therefore a proper charge subject to which they were sold.

Tomlin K.C. was not called upon to reply.

SWINFEN EADY M.R. This is an appeal from an order of Astbury J. which raises quite a short point. The plaintiff has obtained a charging order on certain shares in a company that were the property of one Shanks, an undischarged bankrupt, and the question raised is as to the validity of the charging order as against the purchasers of the shares from the trustee in bankruptcy. By the terms of the order under appeal the judge decided that the shares were validly and effectively charged in favour of the plaintiff, and the defendants other than the company appeal. The company had a prior lien on the shares and the parties agree that this lien was paramount, and the plaintiff by the order submitted to redeem that lien. No question, therefore, was involved as to the priority of the company's lien. But, subject to that lien, the learned judge has decided that there was a valid and effective charge in favour of the

(1) 25 Q. B. D. 262.
(2) [1892] 2 Ch. 138.
(3) 25 Q. B. D. 268.
(4) [1895] 1 Ch. 325.

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plaintiff, and the defendants appeal and say that the plaintiff has no valid charge on the shares as against them.

The facts are these. Shanks was adjudicated bankrupt in 1894, and he has not obtained his discharge. During the bankruptcy Shanks acquired the shares in question, namely, 326 shares, in Ayre & Kingcome, Limited. Those shares form part of the after-acquired property of the bankrupt. The plaintiff on April 25, 1913, recovered judgment against Shanks for 62*l.* 5*s.* and costs. Apparently the fact that Shanks was an undischarged bankrupt does not appear to have been known to the parties.

On May 16, 1913, the plaintiff obtained a charging order nisi on the shares, and on June 13, 1913, the charging order was made absolute. Subsequently the trustee in bankruptcy intervened and sold to the defendants Kingcome and his nominees the trustee's interest in the shares in question. The sale of the shares was made subject to all proper charges thereon. If, therefore, the charging order is valid as against the trustee in bankruptcy, the purchasers purchased the shares subject to that charge; but if not, then the purchasers took the shares free from the charge. The trustee sold his interest and protected himself by inserting the words "subject to all proper charges thereon." Since the sale some of the shares have been transferred and the defendants are the present holders.

In these circumstances Astbury J. held that the charge in favour of the plaintiff was valid as against the trustee in bankruptcy, and he stated his reasons as follows: "In the present case the charge was obtained against an undischarged bankrupt in respect of property acquired after his bankruptcy and prior to the trustee's intervention, and, in my opinion, it was obtained bona fide and for value or its equivalent." I do not quite know what the learned judge meant by the words "or its equivalent," but obviously he meant to hold that the charge was obtained bona fide and for value. The bona fides was not in dispute, but the question was whether the charge was taken for value.

Under the statute at present in force there is a provision in s. 47 relating to after-acquired property of a bankrupt, but the Bankruptcy Act in force at the time that the charge was made absolute was the Bankruptcy Act, 1883, which does not contain any similar

provision. Sect. 47 of the Act of 1914 was, however, a statutory recognition and embodiment of the law previously laid down by this Court in *Cohen* v. *Mitchell*. (1) Although the Bankruptcy Act, 1883, protects certain transactions in respect of property belonging to a bankrupt at the date of the bankruptcy, it does not contain any express provision as to property accruing to the bankrupt during the continuance of the bankruptcy other than a provision vesting it in the trustee; and the principle of dealing with after-acquired property of an undischarged bankrupt was laid down in *Cohen* v. *Mitchell*. (1) In that case Lord Esher, with the consent of the other members of the Court, in terms proceeded to lay down a rule. He said (2): "I am, therefore, prepared to lay down a proposition which has been agreed upon by us all, and which has been written down by my brother Lopes. It is this—until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. It will be seen, I think, from the wording of that proposition, that the stress of bona fides is laid entirely and solely on the person dealing with the bankrupt; and if he has dealt in good faith, the question of whether the bankrupt, as between himself and the creditors, is also dealing in good faith is immaterial." It is the law as thus laid down that is embodied in s. 47 of the Bankruptcy Act, 1914.

Mr. Beebee, on behalf of the plaintiff, contended that the proposition so laid down could not be treated as exhaustive, conceding that if it was exhaustive he was unable to maintain the validity of the order under appeal. It will be observed that the only transactions protected according to this proposition are dealings with the bankrupt bona fide and for value, and it is, no doubt, on that ground that Astbury J., in sustaining the validity of the charge, says that "it was obtained bona fide and for value." The question, then, is whether a transaction—or, rather, a process—of this sort was a dealing or transaction with the bankrupt for value. It is in reality a process in invitum; and there was no dealing with the bankrupt at all, but merely a taking in execution by process of law of what the judgment creditor was able to seize. In my opinion it was no

(1) 25 Q. B. D. 262. (2) 25 Q. B. D. 267.

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more a dealing or transaction for value with the bankrupt than a garnishee order would be. There is no mutual transaction or mutual dealing for value between the parties, and I fail to see that the interest acquired by the plaintiff is in any way protected. If the same question were to arise under the present Bankruptcy Act it would be quite clear that the interest would not be protected by s. 47 of the Act of 1914. It would not be a transaction " by a bankrupt with any person dealing with him bona fide and for value, in respect of property . . . . acquired by the bankrupt after the adjudication." The cases of *Ex parte Pillers* (1), which was a decision under the Bankruptcy Act, 1869, and *In re O'Shea's Settlement* (2), which was decided under the Bankruptcy Act, 1883, support this view.

The result is that in my opinion the charge cannot be sustained as against the trustee in bankruptcy. It is not a proper charge in the sense of being a valid charge as against the trustee in bankruptcy. He could have claimed the shares free from the charge, and when he sold his interest in the shares he must be taken to have sold it free from the charge. It follows that the appeal must be allowed and the order of Astbury J. discharged so far as it sustained the validity of the plaintiff's charge. The consequence is that the plaintiff has entirely failed, and that this summons must be dismissed.

WARRINGTON L.J. I am of the same opinion. The plaintiff is a judgment creditor of one Shanks, and on June 13, 1913, he obtained a charging order against certain shares belonging to Shanks in a limited company. At this date Shanks was an undischarged bankrupt, having been adjudicated bankrupt in 1894. The shares were by s. 44 of the Bankruptcy Act, 1883, included in the property divisible amongst his creditors. The learned judge has made an order equivalent to a judgment for sale in lieu of foreclosure. The effect of this order was to assert the priority of the charging order over the title of the defendants in the present proceedings. The title of the defendants is that, before the plaintiff had applied to realize the security created by the charging order, the trustee in bankruptcy intervened by selling and transferring the shares to the purchasers or their nominees. Some

(1) 17 Ch. D. 653. (2) [1895] 1 Ch. 325.

of the transferees have been made defendants. They are the persons against whom the order now under appeal was made.

The first question is a short question of law, namely, Is a charging order such a proceeding as to be valid against the prior title of the trustee under the Act of 1883? The construction in this respect of the Act of 1883 was declared by the Court of Appeal in *Cohen* v. *Mitchell* (1) in these terms: "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." This is how the law stood under the Act of 1883, which governs the present transaction; but that declaration of the law was adopted with an immaterial extension by the present Bankruptcy Act, 1914, in s. 47. It has now become not merely a matter turning on the true construction of the Act of 1883, but a matter coming under the express provisions of s. 47 of the Act of 1914. That section provides: "All transactions by a bankrupt with any person dealing with him bona fide and for value, in respect of property, whether real or personal"—so far as it is referring to real estate that is an extension of *Cohen* v. *Mitchell* (1)—"acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee." I need not read the rest of the section, which has no bearing on the present case. The question here is whether the charging order absolute was a transaction for value. It is impossible to hold that it was a transaction for value even if it could be properly described as a transaction, which I do not think it could. A judgment creditor who obtains a charging order gives no consideration for it, but he is merely enforcing to the utmost of his powers those remedies which his judgment gives him against his debtor. To say that he is exercising a forbearance towards the debtor is to say that which is not the fact.

Warrington L.J

So far I have made no reference to authority, but the case is really governed by *In re O'Shea's Settlement* (2) in the Court of Appeal. It is true that that case did not refer to after-acquired property, but it is a decision that a charging order is not a transaction under s. 49 of the Act of 1883. That section protected, amongst other

(1) 25 Q. B. D. 262, 267. (2) [1895] 1 Ch. 325.

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things, any contract, dealing, or transaction by or with the bankrupt for valuable consideration, and the decision in *In re O'Shea's Settlement* (1) is that a charging order is not, within that section, a contract, dealing, or transaction, and that it is not for valuable consideration. In my opinion, both on principle and authority, it is clear that the charging order is not valid as against the trustee.

But there arises the question of fact whether the trustee did in fact intervene so as to displace the charging order. He might, of course, if so minded, have so limited his intervention as not to interfere with the charging order; but to my mind it is clear from the letters written on February 14 and 16, 1916, which are admitted to express the trustee's own view of the transaction, that he did intervene completely. In these letters he says he sold his interest in the shares subject to all proper charges thereon, which I take to mean his interest in the shares subject to all charges proper and valid against him. It seems to me, therefore, that there was a complete intervention. That being so, the charging order was not valid against the trustee, and consequently it was not valid against the purchasers from him. It was suggested that the purchasers bought the shares with knowledge of the charging order; but that makes no difference. A man may well buy property subject to such charges as are valid and know of a charge, but he is still at liberty to dispute its validity unless he has bound himself by contract not to dispute it or is estopped by conduct from doing so. There is nothing of this kind to bind the purchasers here. It follows that the order of Astbury J. was wrong and ought to be discharged.

DUKE L.J. The learned judge in this case tried the case on the footing that the question was whether a charging order was a transaction for value which was protected by the principle laid down in *Cohen* v. *Mitchell* (2), and he said: "The only question is whether the charging order ought not to be regarded as a transaction for value within *Cohen* v. *Mitchell*." (2) What is a transaction with the debtor was explained in concise language by Lindley L.J. in *In re O'Shea's Settlement*. (3) It is true that the Lord Justice was there dealing with a transaction before the date of the bankruptcy,

(1) [1895] 1 Ch. 325. (2) 25 Q. B. D. 262.
(3) [1895] 1 Ch. 331.

but I do not think that that makes any difference in principle. He said: "'Contract, dealing, or transaction' with the bankrupt means something done by him." Anything less accordant with that description than a seizure of the bankrupt's property by force under a charging order I cannot conceive. It is true there are cases in which process of Court is applied by arrangement with the debtor, and a question of fact may then arise whether the dealing is a transaction with the debtor, but nothing of the kind occurred here. Again, the learned judge in the Court below says there was a transaction for value, but there is no sign of value moving from the creditor to the debtor in this case, and it seems to me that the only possible answer to the question asked in his judgment by the learned judge is that when the facts are seen it is clear this cannot be regarded as a transaction for value.

A further question raised here, which does not appear to have been raised before the learned judge, was whether the trustee intervened as to the interest in these shares charged by the charging order. Having regard to the trustee's own statement and the absolute assignment of the shares by him subject only to the lien of the company, I think it clear that he did intervene.

It was urged by Mr. Beebee that great difficulty would arise from our refusing to recognize the liability of after-acquired property to what is called equitable execution. I am not so much impressed by this as I should be if I could forget that in recent years the amount for which an undischarged bankrupt can obtain credit without committing a misdemeanour has been limited by statute.

I agree, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors: *Clowes, Hickley & Steward; Sutton, Ommanney & Oliver.*

W. I. C.

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July 17, 22.

In re EGAN.
KEANE *v.* HOARE.

[1917 E. 378.]

*Charity—Charitable Purposes—Advancement of Religion—Bequest for Masses for Soul of Testator—Superstitious Uses—*1 *Edw.* 6, *c.* 14.

A bequest for masses for the soul of the testator is invalid under the statute 1 Edw. 6, c. 14.

So *held* by the Court of Appeal, affirming the decision of Eve J.

Adams and Lambert's Case (1602) 4 Rep. 104b, *West* v. *Shuttleworth* (1835) 2 My. & K. 684, *Attorney-General* v. *Fishmongers' Co.* (1841) 5 My. & Cr. 11, *Heath* v. *Chapman* (1854) 2 Drew. 417, *In re Michel's Trust* (1860) 28 Beav. 39, and *In re Blundell's Trusts* (1861) 30 Beav. 360 followed.

APPEAL from a decision of Eve J.

Edward Egan, by his will dated November 29, 1916, after appointing executors thereof and directing the payment of his debts and funeral and testamentary expenses, bequeathed (inter alia) the following pecuniary legacies: namely, to "the cathedral" for masses; to the Jesuit Fathers, Farm Street, 200*l.* for masses; to the Dominican Fathers, Black Abbey, Kilkenny, 100*l.* for masses; to the Franciscan Fathers, Walking Street, Kilkenny, 100*l.* for masses; and he provided that "what money remains after all expenses I wish to be given to the Jesuit Fathers, Farm Street, for masses."

The testator died on December 27, 1916, and his will was duly proved by his executors on January 23, 1917.

An originating summons was taken out by the executors for the determination (inter alia) of the following questions: (1.) whether the Westminster Cathedral, situate in Ashley Place, was "the cathedral" referred to in the will, and whether the gift to such cathedral for masses was valid; (2.) whether the gift to the Jesuit Fathers for masses was valid; (3.) whether the gift to the Dominican Fathers for masses was valid; (4.) whether the gift to the Jesuit Fathers for masses of "what money remains after all expenses" was sufficient to pass the personal estate of the testator, and whether such gift was valid; and (5.) if any of the aforesaid gifts failed, whether the statutory next of kin of the testator or the residuary legatees were entitled to the benefit of such payment.

By an order dated July 18, 1917, Eve J. declared that the Westminster Cathedral was the cathedral referred to in the will.

On January 14, 1918, the Master by his certificate found that the testator was on November 29, 1916, the time of making his will, and on December 27, 1916, the time of his death, domiciled in England.

On June 4, 1918, the case came on for further consideration before Eve J. His Lordship, in the course of his judgment, said that the authorities against the validity of the bequests were too strong. The law on the matter had been settled for well nigh a century. In those circumstances, if any alteration was to be made it must be effected by the House of Lords. He could only declare that the bequests were invalid, and, being undisposed of, passed to the testator's next of kin.

Cardinal Bourne, as representing the Westminster Cathedral, and the Rev. Terence Donnelly, as representing the Jesuit Fathers of Farm Street, appealed.

C. J. Mathew K.C. and *McMullan* for the appellants. The whole case for the invalidity of the gifts rests on *West* v. *Shuttleworth*. (1) From the first Act of Uniformity (2 & 3 Edw. 6, c. 1), which was passed in the year after the statute 1 Edw. 6, c. 14, until the Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), the mass was illegal and gifts for masses were necessarily void. The reported cases prior to *West* v. *Shuttleworth* (1) were cases falling within the enacting part of the statute 1 Edw. 6, c. 14, and have no bearing on the present case. Such gifts were valid at common law, and were valid at the passing of that Act except in the case of gifts of land avoided by 23 Hen. 8, c. 10, which expressly validated gifts for not more than twenty years. The preamble to the statute 1 Edw. 6, c. 14, should be interpreted by the enacting part of the Act, which was limited to certain defined classes of gifts then existing and did not purport to make anything void or to affect any further gifts. If the preamble is to be interpreted as in *West* v. *Shuttleworth* (1), then, it is submitted, it was impliedly repealed by the Roman Catholic Charities Act, 1832 (2 & 3 Will. 4, c. 115). *West* v. *Shuttleworth* (1) and the cases following it were, it is submitted, decided on a

(1) 2 My. & K. 684.

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misapprehension of the nature of the gifts in question, which is as stated in *O'Hanlon* v. *Logue.* (1) The gifts are for the advancement of religion and are therefore charitable. [They also referred to *Heath* v. *Chapman* (2); *Attorney-General* v. *Fishmonger's Co.* (3); *In re Michel's Trust* (4); *In re Blundell's Trusts* (5); *In re Fleetwood* (6); *Yeap Cheah Neo* v. *Ong Cheng Neo* (7); Co. Litt. 96b; Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32); Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59); Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 1; Boyle on Charities, p. 242; Duke on Charitable Uses, pp. 446-449.]

J. MacVeagh for the Dominican Fathers adopted the same argument.

Sir Alfred Callaghan and *J. A. R. Cairns* for the next of kin. The bequests are void as gifts for superstitious uses under the statute 1 Edw. 6, c. 14, and are also void as not being charitable within the spirit and intendment of 43 Eliz. c. 4. The law in Ireland in regard to masses is entirely dissimilar to that which prevails in this country. The statute 1 Edw. 6, c. 14, has never had any application to Ireland. *O'Hanlon* v. *Logue* (1) has therefore no application to the present case. Although the statute 43 Eliz. c. 4 does not apply to Ireland, there is an analogous statute, 10 Car. 1, sess. 3, c. 1 (Ir.), which by s. 1 provides for the advancement of pious intentions and the better execution of charitable uses and trusts. There are trusts in that Act which, according to Littleton, were purposely omitted from 43 Eliz. c. 4. These trusts are "the building or maintaining in repair of any church and the maintenance of any minister or preacher of the Holy Word of God." It was upon those words that the Court of Appeal in Ireland in *O'Hanlon* v. *Logue* (1) was enabled to decide that the bequest for masses in that case was valid. In all the reported cases since 1829 bequests for masses have been held to be void in this country. To render a bequest charitable it must be shown that the testator contemplated conferring some public benefit on his fellow men, and that the bequest is not in support of any object contrary to public morals, the law

(1) [1906] 1 I. R. 247.
(2) 2 Drew. 417.
(3) (1839) 2 Beav. 151; (1841) 5 My. & Cr. 11.
(4) 28 Beav. 39.
(5) 30 Beav. 360.
(6) (1880) 15 Ch. D. 594.
(7) (1875) L. R. 6 P. C. 381, 396.

of the land, or to public policy. In Ireland all churches are equal in the eyes of the law, but in this country the Church of England is the Established Church, and in Article 31 of the 39 Articles set out in the Prayer Book it is clearly stated that masses do not confer any public benefit. In *Bowman* v. *Secular Society* (1) Lord Parker said: "If, however, it be held that A. is a trustee, then, as the trust [for procuring masses to be said for the testator's soul] is unlawful, equity will not allow the trustee to retain the legacy." Further, the bequests being to communities whose members are bound together by monastic vows, they are gifts to illegal societies, and as such are void: Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 29; Roman Catholic Charities Act, 1860, s. 7; *Cussen* v. *Hynes* (2); *In re Boyd.* (3)

G. N. Marcy for the executors.

Cur. adv. vult.

July 22. The following judgment of the COURT (Swinfen Eady M.R. and Warrington and Duke L.JJ.) was read by

SWINFEN EADY M.R. The question raised by this appeal is whether several gifts to Jesuit Fathers, Dominican Fathers, and others "for masses," bequeathed by the will of Edward Egan, who died on December 27, 1916, are valid. Mr. Mathew, who appeared for the appellants, stated that he did not desire to draw any distinction between gifts "for masses" simply and gifts for masses for the soul of the testator, as it would be well understood by Roman Catholics that the gifts contained in this will were for masses for the soul of the deceased. Eve J. decided that the bequests were invalid, treating the matter as law which had long since been settled. We are of the same opinion.

The law on the subject is too well settled to be shaken or disturbed by this Court, having regard to the whole course of the decisions since the statute of 1 Edw. 6, c. 14: see *Adams and Lambert's Case* (temp. Elizabeth) (4) and the numerous decisions there examined; Duke on Charitable Uses, p. 126; *West* v. *Shuttleworth* (5); *Attorney-General* v. *Fishmongers' Co.* (6); *Heath* v.

(1) [1917] A. C. 406, 437.
(2) [1906] 1 I. R. 539.
(3) (1907) Times Newsp. Nov. 25, 1907.
(4) 4 Rep. 104b.
(5) 2 My. & K. 684.
(6) 5 My. & Cr. 11.

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Chapman (1); *In re Michel's Trust* (2); *In re Blundell's Trusts.* (3)

The law is different in Ireland: see *Attorney-General* v. *Hall* (4); *O'Hanlon* v. *Logue.* (5) The statute 1 Edw. 6, c. 14, did not extend to Ireland.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Witham, Roskell, Munster & Weld; H. J. Speechley; H. Z. Deane; Ellis, Leathley & Willes.*

W. I. C.

C. A. 1918 SARGANT J. *April* 12, 19; *May* 7. C. A. *July* 8, 9, 25.

In re MAYOR, &c., OF PLYMOUTH AND WALTER.

[1917 P. 1491.]

Corporation—Power to sell Land—Approval of Local Government Board—Construction of Act—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 108, 109—*Plymouth Corporation Act,* 1898 (61 & 62 *Vict. c. cxxxix.*), *s.* 13—*Plymouth Corporation Act,* 1915 (5 & 6 *Geo.* 5, *c. lxix.*), *ss.* 186, 259.

The Plymouth Corporation Act, 1898, after recitals relating to the undertaking of a certain embankment company and certain tramways, wharf works, cattle market and lands for recreation purposes, which it was expedient for the corporation to take over, construct, maintain and acquire, by s. 2 incorporated the Lands Clauses Acts and Parts II. and III. of the Tramways Act, 1870, and by ss. 5 to 12 made certain provisions expressly relating to such works and lands to be so taken over or acquired, and by s. 13 enacted that, notwithstanding anything in the Lands Clauses Acts or in any other Act or Acts to the contrary, the corporation might sell "any lands within the borough or any interest therein acquired by them prior to or under this Act." By the Local Government Board's Provisional Order Confirmation (No. 18) Act, 1914, and the Plymouth Corporation Act, 1915, the areas of the boroughs of Plymouth, the adjoining borough of Devonport and the adjoining urban district of East Stonehouse were formed into a single new borough called the borough of Plymouth, and the inhabitants of

(1) 2 Drew. 417, 424.
(2) 28 Beav. 39.
(3) 30 Beav. 360.
(4) [1897] 2 I. R. 426.
(5) [1906] 1 I. R. 247.

the new borough were incorporated under the same title, and by the same legislation the ancient possessions of the former corporation became vested in the new corporation. Sect. 186 of the Act of 1915 contained a similar clause to s. 13 of the Act of 1898 as to any lands "vested in or acquired by them prior to or under this Act," with the following proviso, "Provided that nothing in this section shall be taken to dispense with the necessity for obtaining the approval of the Local Government Board to any alienation sale lease or other disposition of any lands for which such approval would be required but for the provisions of this Act." Sect. 259 repealed the Act of 1898 except certain specified sections thereof which did not include s. 13. The corporation having contracted to sell land forming part of its old possessions originally vested in the old corporation by an Act of 18 Henry VI. (1439), a summons was taken out raising the question whether the corporation had power to sell the land without the consent of the Local Government Board under the Municipal Corporations Act, 1882, ss. 108, 109 :—

Held by Sargant J., and affirmed by the Court of Appeal, that according to the true construction of s. 13 of the Act of 1898, and having regard to the general scope of that Act, the corporation had no power to sell land forming part of its ancient possessions free from the restrictions imposed by the Municipal Corporations Act. 1882, ss. 108, 109.

Hawkins v. *Gathercole* (1855) 6 D. M. & G. 1 applied by Sargant J.

Semble, per Sargant J. and the Court of Appeal, that the proviso in the Act of 1915 would not have had the effect of imposing such restrictions as above mentioned if on the true construction of s. 13 of the Act of 1898 these had not already existed.

VENDOR AND PURCHASER SUMMONS.

By an agreement dated May 8, 1917, made between the mayor, aldermen, and burgesses of the borough of Plymouth, acting by the council (hereinafter called the corporation), of the one part, and Percy John Walter (hereinafter called the purchaser) of the other part, the corporation agreed with the purchaser for the sale to him of certain freehold property situate in Exeter Street, Plymouth, which formed part of the ancient estates of the corporation, for 1300*l.*

The lands comprised in the agreement were acquired by the corporation under the Act of incorporation, 18 Henry VI., and were situate within the borough.

This was a vendor and purchaser summons taken out by the corporation for the determination of the question raised by the purchaser in his objections to title whether the corporation had

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power to sell the land comprised in the agreement without the approval of the Local Government Board.

The arguments turned on the provisions of the Plymouth Corporation Act, 1898, the Local Government Board's Provisional Order Confirmation (No. 18) Act, 1914, and the Plymouth Corporation Act, 1915 (the material clauses of which are set out in the note at the end of the report (1)), the vendors contending, first, that under s. 13 of the Act of 1898 they had power to sell the land as part of the ancient possessions of the corporation free from the restrictions imposed by the Municipal Corporations Act, 1882, and, secondly, that the power conferred by s. 13 of that Act was not taken away by the Acts of 1914 and 1915. The purchaser disputed each of these propositions. The facts are sufficiently stated in the above head-note and in the judgment of Sargant J.

The summons came on for hearing before Sargant J. on April 12, 1918.

J. M. Gover for the corporation.

Fairfax Luxmoore for the purchaser.

[The following cases were cited in the course of the arguments:—*Hawkins* v. *Gathercole* (2), *River Wear Commissioners* v. *Adamson* (3), and *Income Tax Commissioners* v. *Pemsel.* (4)]

Cur. adv. vult.

May 7. SARGANT J. delivered the following written judgment:—This summons raises the question whether the present corporation of Plymouth, acting by their council, can sell without the consent of the Local Government Board certain land forming part of the ancient estates of the former corporation of Plymouth.

The land in question forms part of the temporalities of the prior and convent of Plympton, which were vested in the former corporation of Plymouth by virtue of an Act of 18 Henry VI. The areas of the borough of Plymouth, the adjoining borough of Devonport, and the adjoining urban district of East Stonehouse have recently, namely, by the Local Government Board's Provisional Order Confirmation (No. 18) Act, 1914, and the Plymouth Corpora-

(1) See post, p. 370, n.
(2) 6 D. M. & G. 1.
(3) (1877) 2 App. Cas. 743, 764.
(4) [1891] A. C. 531.

tion Act, 1915, been formed into a single new borough called the borough of Plymouth, and the inhabitants of the new borough have been incorporated as mayor, aldermen, and burgesses of the borough of Plymouth in like manner as the inhabitants of the former borough of Plymouth were formerly incorporated under the like title. And, further, by the same legislation the ancient possessions of the former corporation of Plymouth have (together with other property) become vested in the present corporation of Plymouth. Prima facie, of course, the restriction on the sale of municipal land expressly imposed by ss. 108 and 109 of the Municipal Corporations Act, 1882, and modified by s. 72 of the Local Government Act, 1888, applies to the land in question; and it is for the vendors to show that they have been relieved from this restriction. Their case is that the restriction was removed as regards their predecessors in title, the former Plymouth Corporation, by virtue of s. 13 of the Plymouth Corporation Act, 1898; and, further, that under the combined effect of the Local Government Board's Provisional Order Confirmation (No. 18) Act, 1914, and the Plymouth Corporation Act, 1915, their own situation in this respect is as favourable as that of the former corporation of Plymouth. The purchaser denies both these propositions.

The terms of s. 13 of the Plymouth Corporation Act, 1898, are as follows: [His Lordship read the section, and continued:]

A plain and obvious purpose of this section is, of course, to free land acquired by the corporation as statutory undertakers for the purposes of the Act from the obligations as to resale, pre-emption, vesting in adjoining owners, and the like, imposed by the Lands Clauses Acts and other similar legislation. But it is contended for the corporation that this purpose does not exhaust the effect of the section, that the words used are wide enough to designate any and whatever belonging to or acquired by the corporation prior to the passing of the Act, including their ancient estates or possessions, and accordingly that as regards these estates the corporation are relieved by the section from the fetter on alienation imposed by ss. 108 and 109 of the Municipal Corporations Act, 1882. In my opinion, this contention is not correct.

In the first place, I have some doubt whether the words "lands . . . . acquired by them prior to or under this Act" are in them-

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selves, and apart from any question of the general intention of the Act, sufficient to include the ancient estates in question. The close collocation in this phrase of the words " prior to or under " suggests that the acquisition in each alternative is of the same kind, though the date of acquisition is different. And the phrase is exactly appropriate to include lands which may have been (as is so often the case) acquired by statutory undertakers for the purposes of their undertaking before they have actually obtained statutory authority, while it seems to me inappropriate to include lands which, instead of being acquired de novo for statutory undertakings, have been vested in the corporation for hundreds of years and form part of their ancient possessions. The more natural phrase to include such lands would be " vested in " or " belonging to " the corporation prior to the Act; and, indeed, the former words are the words used in s. 186 of the Plymouth Corporation Act, 1915, where the object clearly is to include all the lands of the corporation of every description.

But a much broader and more satisfactory reason for declining to give to s. 13 the extended effect contended for is to be found in a consideration of the general scope and effect of the Plymouth Corporation Act, 1898. Apart from the disputed effect of the words in question, both the preamble and the enacting sections of this Act appear to deal simply and solely with certain definite statutory undertakings in regard to which the Plymouth Corporation are the undertakers. There is no attempt to alter the general law in any other matter. And there is nothing whatever in the preamble or elsewhere in the Act to show that the corporation had any ancient estates at all, still less that they were in any special position with regard to those estates which rendered it advisable to release them from the restrictions ordinarily imposed on corporations by ss. 108 and 109 of the Municipal Corporations Act, 1882. Neither that Act nor the Act of 1888 is mentioned throughout the Act in question.

Under these circumstances it would, in my judgment, be quite inadmissible to give the rather doubtful and ambiguous words of s. 13 of the Act of 1898 any such large general effect as is contended for. Clearer words than are to be met with in s. 13 might well be controlled by a consideration of the very limited scope of the Act of

which it forms a part, on the principles approved and given effect to in the well-known case of *Hawkins* v. *Gathercole.* (1)

On this view of the effect of the Act of 1898 it is unnecessary actually to decide the further question whether the present corporation are in as favourable a position as to selling as that occupied by the former corporation. I am, however, on this point, inclined to agree with the contention put forward by the corporation. It seems to me that the net result of the Acts of 1914 and 1915 is to place the corporation in precisely the same position with regard to the various properties derived from the former corporation as that corporation was in apart from the provisions of the two Acts in question.

I answer the question on the summons by declaring that the vendors have not power to sell the land without the approval of the Local Government Board.

A. C.

The corporation appealed. The appeal was heard on July 8, 9, 1918.

Tomlin K.C. and *J. M. Gover* for the corporation.

Fairfax Luxmoore for the purchaser.

The arguments were substantially the same as those used in the Court below, and are fully stated in the judgments of the Court of Appeal. The following authorities were referred to:—*In re Watts* (2); *Powell* v. *Kempton Park Racecourse Co.* (3); 7 Bac. Abr. Stat. (I.) 2.

Cur. adv. vult.

July 25. SWINFEN EADY M.R. read the following judgment:—The question raised by this appeal is whether the mayor, aldermen, and burgesses of the borough of Plymouth have power to sell certain lands and messuages forming part of the ancient corporate lands of the old corporation of Plymouth without the consent of the Local Government Board.

The borough of Plymouth was incorporated by an Act of 18 Henry VI., which vested in the mayor and commonalty certain

(1) 6 D. M. & G. 1, 21, 22. (2) (1885) 29 Ch. D. 947, 950.
(3) [1899] A. C. 143, 157, 184.

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lands and hereditaments within the limits of the borough, then belonging to the prior and convent of Plympton, and the corporation became liable perpetually to render and pay to the prior and convent and their successors in the priory the annual sum of 41*l.* The lands comprised in the present contract for sale form part of the lands and hereditaments vested in the borough of Plymouth by this statute of Henry VI. It is provided by s. 108 of the Municipal Corporations Act, 1882, that the council of a borough shall not, unless authorized by Act of Parliament, sell or alienate any corporate land without the approval of the Treasury—now, by s. 72 of the Local Government Act, 1888, the Local Government Board. The Plymouth Corporation Act, 1898, was passed on July 25, 1898, and is an Act to vest in the Plymouth Corporation the undertaking of the Company of Proprietors for Embanking part of the Lairy near Plymouth; to empower the corporation to make new street works, and to construct and maintain an additional tramway; to extend the boundary of the borough, and for other purposes. Reliance is placed on s. 13 of this Act (1) as empowering the corporation to sell their ancient corporate lands without the consent of the Local Government Board. The section is as follows: [His Lordship read the section, and continued:]

On May 14, 1914, a Provisional Order was made by the Local Government Board whereby the old borough of Plymouth, the borough of Devonport, and the urban district of East Stonehouse were dissolved and a new corporation called the borough of Plymouth was incorporated embracing the whole united area of the three previous authorities. Art. III., clause 5, of this Order preserved to the new borough of Plymouth the benefit of the charters granted for the incorporation of the old borough. This Order was confirmed by statute passed on August 10, 1914.

It is not disputed that for all the purposes of the present question the new corporation of Plymouth stand in the same position as the old corporation. On July 29, 1915, was passed the Plymouth Corporation Act, 1915. Sect. 186, sub-s. 1 (2), is as follows: [His Lordship read the sub-section, and continued:] Sect. 227 provides that the provisions of art. III. of the Order of 1914 shall extend

(1) See the section set out in the note at the end of this report.

(2) See note, post, p. 372.

and apply to the Act passed in 18 Henry VI. incorporating the town and inhabitants of Plymouth as if it were a charter within the meaning of the said article. Sect. 259, sub-s. 1 (*a*), provides for the repeal of certain Acts, including the greater part of the Plymouth Corporation Act, 1898. The enactments set forth in the Second Schedule, which are stated not to be repealed, include the statute of 18 Henry VI., which is there set forth at length.

The corporation have urged on this appeal that, according to the true construction of s. 13 of the Act of 1898, the consent of the Local Government Board is not necessary to any sale of their ancient landed possessions any more than to the sale of any surplus lands acquired under recent statutory powers.

The respondent, the purchaser, contends that s. 13 has not any application to the ancient lands of the corporation, and, moreover, that if it had, it has been repealed by the Act of 1915, and cannot therefore be relied upon. This latter point depends upon the proper construction of s. 186, sub-s. 1, of the Act of 1915. That sub-section is a general enabling provision authorizing the corporation to sell lands vested in or acquired by them prior to or under that Act, but preserving the necessity for obtaining the approval of the Local Government Board to any sale, if so required at the time of the passing of that Act, but not otherwise. If, therefore, according to the true construction of s. 13 of the Act of 1898, the consent of the Local Government Board would not have been required to any sale made after that Act of any of the ancient lands, such sale may still be made under the authority of s. 186, sub-s. 1, of the Act of 1915 without the approval of the Local Government Board, as this consent is only necessary after the Act of 1915 in cases when it would have been necessary immediately before the passing of that Act.

The question involved in this appeal therefore resolves itself into this: Does s. 13 of the Act of 1898 enable the corporation to sell its ancient lands without obtaining the previous approval of the Local Government Board? It is urged that the language of the section is clear and unambiguous, and that the enacting words cannot be cut down by the preamble. In approaching the consideration of this question it must be borne in mind that there is a general statutory provision applicable to municipal boroughs

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throughout the kingdom which prohibits the sale of their corporate land without the approval of the Local Government Board, and that the Plymouth Corporation Act of 1898 is a private Act applicable to the particular corporation only, passed to give effect to particular purposes mentioned in the Act, and does not contain any indication of any reason for exempting Plymouth from the general law applicable to all other municipal corporations in the kingdom. Again, s. 13 is one of a group of sections extending from s. 5 to s. 13, headed "Part II.—Lands," and dealing with matters which may be comprehensively described as Lands Clauses powers, including a power to enter upon, take and use certain defined lands, and as to part thereof to take them compulsorily. It will be observed that the first power conferred by s. 13 is to retain, hold, and use certain lands within the borough for such time as they may think fit. This provision cannot have any reference to their ancient corporate lands, in respect of which the power was already possessed. The reference, however, to "anything in the Lands Clauses Acts or in any other Act or Acts to the contrary" gives the key to the meaning. Under the Lands Clauses Acts and Acts conferring power to acquire lands for particular undertakings the lands so acquired can only be used for the particular purposes for which their acquisition was sanctioned: see *Bostock* v. *North Staffordshire Ry. Co.* (1); *Mulliner* v. *Midland Ry. Co.* (2); and when they become superfluous must be sold and cannot be retained indefinitely. Moreover, under the Lands Clauses Acts certain persons have rights of pre-emption over these lands, and if the price is not agreed it must be ascertained by arbitration. Sect. 13 of the Act of 1898 confers upon the corporation a more extended power as to the consideration, terms, and conditions of sale. Again, the introductory words before the sections of the Lands Clauses Act, 1845, relating to the sale of superfluous lands run: "And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith," and the commencement of s. 13 refers to similar statutory provisions.

The result is that, having regard to the general purport of the whole of the Act of 1898, the true construction of s. 13, so far

(1) (1855) 4 E. & B. 798. (2) (1879) 11 Ch. D. 611.

as it relates to "any lands within the borough or any interest therein, acquired by them prior to or under this Act," is that such section is limited to lands so acquired for specific definite purposes under express statutory provisions, and does not extend to the ancient corporate lands, in respect of which the corporation already had full powers to sell or retain and use, subject only to any alienation being approved by the Local Government Board.

I am of opinion that the decision of Sargant J. was correct, and that this appeal fails.

WARRINGTON L.J. read the following judgment:—This is an appeal from an order of Sargant J. made upon a summons under the Vendor and Purchaser Act, 1874, by which he declared that the vendors, the corporation of the borough of Plymouth, had not the power to sell the land and messuages the subject of the agreement for sale without the approval of the Local Government Board. The corporation appeal and insist that they have power to sell without such approval. The land the subject of the agreement for sale is part of the ancient corporate property of the old borough of Plymouth, and was vested in the corporation by the statute of 18 Henry VI. by which it was incorporated. Under the Municipal Corporations Act, 1882, a municipal corporation acts by the council of the borough, and by s. 108 it is provided that the council shall not, unless authorized by Act of Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury, and a similar restriction is imposed in regard to leases, with certain exceptions. By s. 109 it is further provided that the council may with the approval of the Treasury dispose of any corporate land, either by way of absolute sale, or by way of exchange, mortgage, charge, demise, lease or otherwise, in such manner and on such terms and conditions as the Treasury approve. By the Local Government Act, 1888, s. 72, the approval of the Local Government Board was substituted for that of the Treasury.

The appellants contend that the necessary authority to sell without approval was conferred on the council of the original borough of Plymouth by s. 13 of the Plymouth Corporation Act, 1898, and has passed to the council of the present borough. The present borough of Plymouth is the result of the union of the

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boroughs of Devonport and Plymouth and the urban district of East Stonehouse effected by a Provisional Order made by the Local Government Board in 1914 and confirmed by the Provisional Order Confirmation (No. 18) Act of that year. Substantially the effect of the Order is to create a new borough called the borough of Plymouth, made up of three "areas," being those of the old boroughs of Devonport and Plymouth respectively and the urban district. Local Acts applying to the old boroughs respectively are to apply to the corresponding "areas." The existing powers of each of the two boroughs and of the urban district council respectively are to be exercisable by the council of the new borough, and the property of each of the three bodies is transferred to and vested in the new borough. The various local statutory provisions applicable to the three bodies respectively were consolidated by the Plymouth Corporation Act, 1915, and by s. 259 of that Act the Acts and Orders specified in the First Schedule were subject to the provisions of the Act repealed to the extent mentioned in the schedule; s. 13 of the Plymouth Corporation Act, 1898, is included in the repeal. With regard to the sale of corporate property, the powers of the council are now derived from s. 186 of the Act of 1915, and the first question, I think, is whether, assuming that the Act of 1898 conferred upon the council of the old borough the power to sell the land in question without the approval of the Local Government Board, that power continues vested in the council of the present borough notwithstanding the repeal of s. 13 of the Act of 1898. (1) That section is in the following terms: [His Lordship read the section, and continued:] Sargant J. has expressed the view that the operation of the section is confined to land acquired by the corporation as statutory undertakers and does not extend to the ancient estates of the corporation. He seems to have assumed, without deciding it, that as to land so acquired a sale might be made without the necessity of obtaining the approval of the Local Government Board. In the view he took as to the construction of the Act of 1898 it was unnecessary for him to decide the question arising on the Act of 1915, but he expressed himself inclined to agree with the contention put forward by the corporation, namely, that the previously existing powers of each

(1) See note, post, p. 372.

of the old bodies as regards property derived from them respectively were preserved to the present corporation. I propose to assume, for the purpose of determining what, as I have said, I think is the first question, that the Act of 1898 did give power to the old borough to sell any of its lands, however acquired, without the necessity of obtaining the consent of the Local Government Board. Is that power so assumed to exist preserved to the present corporation notwithstanding the inclusion of s. 13 of the Act of 1898 among the statutory provisions repealed? The answer to this question depends on the true construction of s. 186 of the Act of 1915. (1) That section is in the following terms: [His Lordship read the first part of sub-s. 1 of s. 186 down to the proviso, and continued:] There is, however, the following proviso: "Provided that nothing in this section shall be taken to dispense with the necessity for obtaining the approval of the Local Government Board to any alienation sale lease or other disposition of any lands for which such approval would be required but for the provisions of this Act." The proviso seems to assume that the provisions of the section, if unqualified, would dispense in all cases with the necessity for obtaining the approval and then to enact that it shall not be taken to do so in certain particular cases. It is therefore necessary in each case to consider whether the approval would be required but for the provisions of the Act. One of the provisions of the Act is the repeal of s. 13 of the Act of 1898. Would the approval be required but for such repeal? If the assumption made above be correct, it would not, and the case would therefore not be one to which the proviso applies.

I think, therefore, that the first question must be answered in favour of the corporation, and, consequently, that if prior to the Act of 1915 the approval would not be required in the particular case it would not now be required.

Then comes the question whether in the particular case the approval would in fact have been required prior to the Act of 1915. It would be required unless it was dispensed with by s. 13 of the Act of 1898. There are two questions arising on this section. First, whether it dispenses with the necessity of obtaining approval at all, and, secondly, if it does, whether it applies to all the lands of

(1) See note, post, p. 372.

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the corporation or only to lands acquired by them as statutory undertakers.

On the second question I am clearly of opinion that the operation of the section is confined to lands acquired under statutory powers and does not extend to the ancient corporate lands of which the land in question forms part. The reference to the Lands Clauses Acts, the conferring of power to retain and use as well as to alienate the land referred to, the use of the word "acquired" (a word commonly employed in reference to land taken for statutory undertakings), the position of the section in the Act (that is to say, in that part of it which refers to the acquisition of land for particular purposes), as well as the absence of any indication in the preamble or otherwise of an intention wholly to exempt the particular corporation from the general law relating to sales of corporate property, all seem to me to lead to the conclusion that, whatever else may be its effect, its operation does not extend to the land the subject-matter of the agreement in question. That being so, it is unnecessary to consider the first and wider question whether in any case the necessity of obtaining the approval of the Local Government Board is dispensed with. On this question I will only say that it must not be assumed that I am satisfied it ought to be answered in the affirmative.

The order of Sargant J. should, in my opinion, be affirmed and the appeal dismissed.

DUKE L.J. read the following judgment:—The land in question in this case forms part of the ancient estates of a municipal corporation, having been vested in the mayor and commonalty of the borough of Plymouth under the Act of Henry VI. which incorporated them. The question between the parties is whether the corporation are at liberty to alienate this land without the consent of the Local Government Board notwithstanding the prohibition contained in the Municipal Corporations Act, 1882, s. 108, sub-s. 1, as amended by the Local Government Act, 1888, s. 72. The corporation claim to have been relieved from the prohibition by s. 13 of the Plymouth Corporation Act, 1898, and they appeal on that ground from the decision of the learned judge who heard the summons.

The constitution and powers of the appellants are in the main determined by the Municipal Corporations Act and the other public general Acts which regulate municipal government in England and Wales. The Plymouth Corporation Act of 1898 was a private local Act obtained by the then corporation for purposes of local improvement. By an Act of 1914 the then borough of Plymouth, the then borough of Devonport, and the then urban district of East Stonehouse were incorporated in the present borough of Plymouth under the corporation who are the present appellants, and by the Plymouth Corporation Act, 1915, the various local Acts relating to the enlarged municipality have been consolidated and amended. The Act of 1915 is relevant in the present discussion because of the repeal by s. 259 therein of s. 13 of the Act of 1898 and the enactment in its stead of a new section, s. 186, dealing with like matters by provisions similar to but not identical with those of s. 13.

It was contended on behalf of the appellants that in s. 13 of the Act of 1898 the corporation of Plymouth were given a perfectly general power to sell or dispose of their corporate lands on such terms and conditions as they might think fit. They insist that the enacting words are clear and unambiguous and must have the fullest effect given to them in their primary meaning. Omitting words which are said not to limit the generality of the enactment, the appellants rely upon s. 13 as an enactment that "The corporation may . . . . sell or otherwise dispose of in such manner and for such consideration and purpose and on such terms and conditions as they may think fit . . . . any lands within the borough" owned by the corporation. The powers conferred are expressed to be granted "notwithstanding anything in the Lands Clauses Acts or in any other Act or Acts to the contrary," and the appellants claim, therefore, to be free from any restraint imposed by any statute of earlier date than the Plymouth Corporation Act, 1898. The lands within the operation of s. 13 being "lands acquired by them prior to or under this Act" of 1898, the appellants contend that their power of sale is extended to whatever lands the corporation possessed when the Act of 1898 passed or acquired afterwards under its authority. The claim made by the appellants, if it is valid, extends far beyond the restrictions in the Lands Clauses Acts and the Municipal Corporations Act. Reference to the local

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Acts which were before the Court on this appeal shows that the appellants hold, and that the corporation in 1898 held, lands for public purposes under a long series of statutes which necessarily involve restraints upon use and alienation, on the principle which is illustrated in cases like *Bostock* v. *North Staffordshire Ry. Co.* (1) and *Mulliner* v. *Midland Ry. Co.* (2) With regard to the restraint imposed on the corporation by the Municipal Corporations Act, 1882, s. 108, sub-s. 1, it is, I think, not immaterial that from the time of the reform of municipal government in England and Wales in 1835 control such as is imposed by that section has been uniformly maintained, and that on the face of the local and private Act of 1898 nothing appears to explain a new departure which probably could not be made in one local Act without abrogating generally the principle on which such control rests. If the words relied on by the appellants would indeed appear on careful perusal to be capable of the meaning which it is said they bear, a case would seem to me to arise for consideration of s. 13 in the light of what was said by Lord Esher in *Reg.* v. *Tonbridge Overseers* (3): "If it had been found that reading them in their ordinary sense they would contradict some other enactments, but that reading them in a sense in which, though not their ordinary sense, they were reasonably capable of being read, they would not contradict such other enactments, then I agree that they should be read so that all the enactments should be read together without contradicting each other."

In my opinion, s. 13 does not bear the meaning put upon it by the appellants. The terms of the section itself, the purpose and language of the group of sections of which it is one, as well as the language and subject-matter of the Act as a whole, appear to me to make this plain. The restrictions removed by s. 13 are statutory restrictions which affect all lands acquired by the corporation in recent times under statutory powers. Whether they in fact arise under the Lands Clauses Acts or under some other like legislation could only be ascertained by looking at the particular instances in which they occur; but reference to the Lands Clauses Consolidation Act, 1845, ss. 125 to 134, seems to me to show plainly the reason why the section under consideration proceeds in the first

(1) 4 E. & B. 798. (2) 11 Ch. D. 611.
(3) (1884) 13 Q. B. D. 339, 342.

place to sanction the retention of land, and, after that, to authorize dealings with acquired lands otherwise than by absolute sale. These sections in the original Lands Clauses Act are sufficient to explain the intention and effect of all the enabling words used in s. 13 of the Act of 1898. The section deals primarily with lands which under the Acts relating to them are forbidden to be retained. Sect. 108, sub-s. 1, of the Municipal Corporations Act, 1882, is an enactment which rather enjoins than forbids the retention of land. Again, the words of s. 13 which describe the lands thereby rendered subject to alienation at the will of the corporation are apt words to describe lands taken or purchased under statutory powers, and they are inapt as a description of all the corporate lands of the appellants. "Lands acquired by the promoters of the undertaking under the provisions of this Act or the special Act" is the descriptive phrase used in the prefatory words which introduce in the Lands Clauses Act, 1845, the sections whereunder the principal restrictions here in question are created. In the group of sections 5 to 13 in the Act of 1898 the word "acquired," which is the governing word in s. 13, is repeatedly used, and used in each case in the sense, as I understand it, in which the same word is used in ss. 127 to 134 of the Lands Clauses Act, 1845.

I am satisfied that the lands to which the Legislature had regard in the enactment of s. 13 are not the corporate lands as a whole of the appellants, but lands which were acquired under statutory restrictions, and that the restrictions which the section removes are not those inherent in the constitution and powers of the appellants as a municipal body, such as the prohibition in s. 108, sub-s. 1, of the Municipal Corporations Act, 1882, but those only which are imposed in respect of acquired lands as statutory conditions of the acquisition thereof. I am therefore of opinion that the appellants are not authorized by Parliament to sell the land here in question, and that the same cannot be sold without the approval of the Local Government Board.

There remains a question of technical interest rather than of substantial importance as to the effect of s. 186, sub-s. 1, and s. 259 of the Plymouth Corporation Act, 1915. Sect. 259 repeals "subject to the provisions of this Act" the material parts of the Act of 1898, including ss. 5 to 13. Sect. 186, sub-s. 1, empowers the corporation

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to retain lands which without the section they could not retain, and relieves them from disabilities in relation to the sale and disposal of "lands or any interest in lands vested in or acquired by them prior to or under this Act or under any of the recited Acts or any other local Act." The inclusion in this section of powers with regard to lands "vested in" the corporation gives it a wider scope than s. 13 had, and the proviso to the section introduces a limitation which is not found in s. 13. The proviso appears to recognize that there are lands of the corporation as to which the restriction expressed in the Municipal Corporations Act, s. 108, sub-s. 1, is still in force. It was argued on behalf of the respondents that the repeal of s. 13 of the Act of 1898 is unconditional and that the proviso to s. 186, sub-s. 1, of the Act of 1915 removes all question as to its possible effect if the Act of 1915 had not been passed. The appellants, however, point out that the proviso extends only to sales for which approval would, but for the provisions of the Act of 1915, be required, and they contend that upon the hypothesis that the Act of 1898 relieved them from the necessity of obtaining the approval of the Local Government Board for the sale now in question, that approval is not required by virtue of the proviso. I think this contention as to the construction of s. 186, sub-s. 1, of the Act of 1915 is correct, but that, inasmuch as s. 13 of the Act of 1898 does not dispense with the necessity for the approval of the Local Government Board to the sale here in question, the appeal fails and ought to be dismissed.

Appeal dismissed.

Solicitors for corporation: *Sharpe, Pritchard & Co., for R. J. Fittall, Plymouth.*

Solicitors for purchaser: *Ravenscroft, Woodward & Co., for Woollcombes & Yonge, Plymouth.*

Note.

Municipal Corporations Act, 1882:—

Sect. 108, sub-s. 1: "The council shall not, unless authorised by Act of Parliament, sell, mortgage, or alienate any corporate land without the approval of the Treasury . . . ."

Sect. 109: "The council may, with the approval of the Treasury,

dispose of any corporate land either by way of absolute sale, or by way of exchange, mortgage, charge, demise, lease, or otherwise, in such manner and on such terms and conditions as the Treasury approve."

By the Local Government Act, 1888, s. 72, the Local Government Board is now substituted for the Treasury.

The Plymouth Corporation Act, 1898 (61 & 62 Vict. c. cxxxix.), after reciting that in 1802 a company referred to as the Embankment Company was incorporated for the purpose of making certain embankments and roads near Plymouth, continued :—

"And whereas the Embankment Company have agreed to sell and transfer the embankment roads and all other their undertaking to the mayor aldermen and burgesses of the borough of Plymouth (in this Act called 'the corporation') upon and subject to the terms and conditions mentioned in this Act and it is expedient that the said roads and undertaking should be vested in the corporation and the Embankment Company wound up as by this Act provided :

"And whereas it is expedient that the corporation should be empowered to make and maintain the street works in this Act mentioned :

"And whereas the corporation have purchased and have also constructed tramways within the borough and it is expedient that they should be empowered to construct and maintain the additional tramway in this Act described and that further provisions should be made as in this Act mentioned in respect to the motive power to be used on the tramways and to the working by the corporation of their tramways :

"And whereas it is expedient that the corporation should be empowered to make and maintain the wharf works in this Act described :

"And whereas it is expedient that the municipal boundary of the borough should be extended as by this Act provided :

"And whereas it is expedient that further and better provision should be made in regard to the cattle market of the corporation the purchase and acquisition of lands for recreation purposes and in regard to other matters of local government and improvement as in this Act mentioned."

Part II. of the Act, which was headed "Lands," continued, s. 5 : "Subject to the provisions and for the purposes of this Act the corporation may enter on take and use all or any of the lands delineated on the deposited plans and described in the deposited book of reference . . . ."

Sect. 6 provided for the correction of errors in deposited plans or book of reference.

Sect. 7 limited the period for the compulsory purchase of lands "under this Act" to five years.

Sect. 8 empowered persons under disability to grant easements "required for the purposes of this Act."

Sect. 9 : "The corporation may appropriate and use for any of the purposes of this Act any lands within the borough for the time being vested in them as a municipal or sanitary authority which are not wanted for the purpose for which such lands were originally acquired but nothing in this section shall authorise the corporation to create or permit the creation or continuance of any nuisance on any such lands."

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Sect. 10 imposed restrictions on taking "under the powers of this Act" houses of the labouring class.

Sect. 11 provided that "in the construction of the works by this Act authorised or otherwise in the exercise by the corporation of the powers of this Act" owners might be required to sell parts only of certain lands and buildings.

Sect. 12: "So long as any lands remain to be acquired by the corporation under the authority of this Act they may so far as they consider necessary apply moneys received by them on re-sale or by way of fine or premium on the grant or renewal of leases in the purchase of lands so remaining to be acquired . . . ."

Sect. 13: "Notwithstanding anything in the Lands Clauses Acts or in any other Act or Acts to the contrary the corporation may retain hold and use for such time as they may think fit and may from time to time sell lease exchange or otherwise dispose of in such manner and for such consideration and purpose and on such terms and conditions as they may think fit and in case of sale either in consideration of the execution of works or of the payment of a gross sum or of an annual rent or of any payment in any other form any lands within the borough or any interest therein acquired by them prior to or under this Act and may sell exchange or dispose of any rents reserved on the sale exchange lease or disposition of such lands and may make do and execute any deed act or thing proper for effectuating any such sale lease exchange or other disposition and on any exchange may give or take any money for equality of exchange."

By the Borough of Plymouth Order, 1914, which incorporated the boroughs of Plymouth and Devonport and the urban district of East Stonehouse into one borough, which was confirmed by the Local Government Board's Provisional Order Confirmation (No. 18) Act, 1914 (4 & 5 Geo. 5, c. clxxxiii.), it was provided (art. XVII.) that subject to the provisions of that Order each of the local Acts should from the commencement of that Order apply to the area or to the industrial undertaking to which it applied immediately before that date and should be in force in so much only of the borough as comprised the said area and in no other part of the borough. "Provided as follows: (1.) For every reference in any of the local Acts to the Devonport borough or to the Plymouth borough or to the urban district shall be substituted a reference to the Devonport area or the Plymouth area or the East Stonehouse area and for every reference therein to the Devonport Corporation or the Devonport Council the Plymouth Corporation or the Plymouth Council or the Urban Council shall be substituted a reference to the corporation of the borough or the council of the borough."

By the interpretation clause (art. I.), "The expression 'the borough' means the borough of Plymouth as constituted by this Order the expression 'the corporation of the borough' means the mayor aldermen and burgesses of the borough and the expression 'the council of the borough' means the corporation of the borough acting by the council."

The Plymouth Corporation Act, 1915 (5 & 6 Geo. 5, c. lxix.):—

Sect. 186, sub-s. 1: "Notwithstanding anything to the contrary in

the Lands Clauses Acts or in any other Act or Acts the corporation may retain hold and use for such time as they may think fit or may sell lease exchange or otherwise dispose of in such manner and for such consideration and purpose and on such terms and conditions as they may think fit and either in consideration of the execution of works or of the payment of a gross sum or of an annual rent or of any payment in any other form any lands or any interest in lands vested in or acquired by them prior to or under this Act or under any of the recited Acts or any other local Act and may sell exchange or dispose of any rents reserved on the sale lease exchange or disposition of such lands or interests therein and may make do and execute any deed act or thing proper for effectuating any such sale lease exchange or other disposition and on any exchange may give or take any money for equality of exchange:

"Provided that nothing in this section shall be taken to dispense with the necessity for obtaining the approval of the Local Government Board to any alienation sale lease or other disposition of any lands for which such approval would be required but for the provisions of this Act."

Sect. 227 provides that the provisions of art. III. of the Order of 1914 shall extend and apply to the Act passed in the 18th year of Henry VI. incorporating the town and inhabitants of Plymouth as if it were a charter within the meaning of the said article.

Sect. 259, sub-s. 1: "Subject to the provisions of this Act—(*a*) the Acts and Orders specified in the First Schedule are hereby repealed to the extent mentioned in that schedule . . . ."

Sub-s. 3 provided (inter alia) that notwithstanding the repeal of the repealed Acts, (*a*) all existing bonds mortgages &c. should continue valid "as if this Act had not been passed"; (*b*) all property vested in the corporation at the commencement of the Act should continue vested in the corporation and all matters done or commenced under the powers of the repealed Acts should be continued enforced and completed "as if this Act had not been passed"; and (*c*) any enactment in the repealed Acts which altered or prescribed the boundaries of the borough or of any district or other area or which made provision with regard to the council or other local authority should continue to have effect "as if this Act had not been passed."

The First Schedule to the Act repealed the whole of the Plymouth Corporation Act, 1898, with the exception of certain specified sections which did not include s. 13.

W. I. C.

SARGANT J.

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June 6, 7, 14.

In re HARRISON.

JOHNSTONE *v.* BLACKBURN AND EAST LANCASHIRE ROYAL INFIRMARY.

[1918 H. 285.]

Revenue—Estate Duty—Settled Legacy—Death of Tenant for Life within Twelve Months from Testator's Death—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 2; *s.* 5, *sub-ss.* 1, 2, 3—*Finance Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 14.

The tenant for life of a settled legacy died before the expiration of a year from the testator's death and before the legacy was paid or appropriated, so that he never became entitled to receive any income in respect thereof;—

Held, that estate duty did not become payable in respect of the legacy on his death.

ORIGINATING SUMMONS.

Henry Harrison, who died on February 25, 1914, by his will, dated April 2, 1913, bequeathed to his trustees the sum of 30,000*l.* upon trust to pay the income thereof to his nephew Reginald Johnstone during his life, and after his death upon trusts in favour of his children, and in default of children upon the trusts declared of another legacy of 25,000*l.* settled by the said will in favour of the testator's nephew Montague Johnstone during his life, and after his death upon trusts in favour of his children, with a direction that in default of children the same should fall into and form part of his residuary estate.

Reginald Johnstone had no children and was killed in the war in September, 1914. At the date of his death the legacy of 30,000*l.* had not been paid or appropriated, so that neither he nor his estate ever in fact became entitled to any income in respect of the legacy. Montague Johnstone had four infant children.

The executors had paid the settlement estate duty payable on the testator's death in respect of the legacy of 30,000*l.*, and subsequently, on the demand of the Inland Revenue authorities, had paid estate duty thereon as on the death of Reginald Johnstone after allowing for the amount of the settlement estate duty previously paid, as provided by s. 14 (*b*) of the Finance Act, 1914; and this was an originating summons taken out by Montague Johnstone as plaintiff

against the residuary legatees, the plaintiff's four infant children, the trustees of the will, and the Commissioners of Inland Revenue as defendants, raising (inter alia) the question whether the settled legacy of 30,000*l.* was properly charged with estate duty on the death of Reginald Johnstone.

Romer K.C. and *Harman* for the plaintiff. Reginald having died after August 14, 1914, any relief from the payment of estate duty on his death given by s. 5, sub-s. 2, of the Finance Act, 1894, was abolished by the Finance Act, 1914, s. 14, but the plaintiff's contention is that in the circumstances the settled legacy is property which is not to be deemed to have passed on his death within the meaning of s. 5, sub-s. 3, of the Finance Act, 1894. (1) The interest of Reginald in the legacy determined, by reason of his death, before the expiration of twelve months from the testator's death before the legacy was paid or appropriated. According to the ordinary rule of administration, no interest became payable on the legacy till the expiration of that period or the earlier payment or appropriation of the legacy, and in the present circumstances neither Reginald nor his estate received any income out of the legacy. Reginald's interest therefore never became an interest in possession within the meaning of s. 5, sub-s. 3, and cannot be said to have passed on his death within s. 1 or to be deemed to have passed on his death within s. 2, sub-s. 1. There is no reason for restricting the language of s. 5, sub-s. 3, so as to limit the operation of that sub-section to reversionary interests which determine during the existence of some prior interests limited by the settlement. Only those interests are subject to duty to the actual enjoyment of which the beneficiary becomes entitled, and Reginald, in the events which happened, never became entitled to any beneficial interest.

Ashworth James for the four infant children of the plaintiff supported the same argument. The income on the legacy pending payment to the legatee within the executor's year belongs to the

(1) Finance Act, 1894, s. 5, sub-s. 3: "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death."

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residuary legatee. It forms part of the mass of the residuary estate. The right to receive the income did not become an interest in possession until there was a fund out of which the interest was given.

Rolt K.C. and *Dighton Pollock* for the residuary legatees supported the same argument.

Sheldon for the Commissioners of Inland Revenue. Estate duty became payable in respect of the legacy of 30,000*l.* on the death of Reginald in September, 1914, after allowing for the amount of settlement estate duty previously paid. I admit that, the testator himself having fixed no period for the payment or appropriation of the legacy, the ordinary rule of administration applies according to which a legacy carries interest only from the expiration of one year from the testator's death or its earlier payment or appropriation, but that rule is one of convenience only, based on the view that "the executor is by law allowed one year from the testator's death to ascertain and settle his affairs: at the end of which time the Court, for the sake of general convenience, presumes the personal estate to have been reduced into possession"—Williams on Executors, 10th ed. p. 1163—and has no bearing on the incidence of estate duty. The interest of Reginald in the settled legacy "passed" under s. 1; and s. 5, sub-s. 3, which is addressed to reversionary interests in the ordinary sense which fail or determine before they fall into possession and enacts that in such cases the property shall not be "deemed to pass" on the death, has no application to the case. [He further referred to the Finance Act, 1894, s. 3, sub-s. 1; s. 7, sub-s. 6; s. 22, sub-s. 1 (*j*), (*l*).] The decision of the Irish Court in *Attorney-General* v. *Power* (1) does not govern this case. If possession means enjoyment, it is admitted that Reginald never had possession. But possession is used in opposition to reversion.

A. Grant K.C. and *F. K. Archer* for the executors and trustees.

Cur. adv. vult.

June 14. SARGANT J. read the following judgment:—The question is whether the 30,000*l.* legacy is chargeable with estate duty on the death of the first beneficiary, the plaintiff's brother Reginald.

(1) [1906] 2 I. R. 272.

The relevant facts are that Reginald died within much less than a year of the testator's death, namely, within some seven months thereof; that no payment or appropriation was made in respect of the legacy during Reginald's life; and accordingly that neither Reginald nor his estate ever became entitled to any income whatever from the legacy. Under these circumstances it is said by the plaintiff that, whether the legacy would, under the other provisions of the Finance Act, 1894, have passed or been deemed to pass from Reginald to the plaintiff, it is at any rate saved from estate duty by the express words of s. 5, sub-s. 3, which appear to be sufficient, if they apply at all, to counteract either a passing under s. 1, or a being deemed to pass under s. 2, sub-s. 1. Did, then, the "interest" of Reginald in his settled legacy of 30,000*l.* "fail or determine by reason of his death before it became an interest in possession" within the meaning of s. 5, sub-s. 3? Now, that "interest" was, according to the settled rule in these matters, merely the right to receive the income of the settled legacy as accruing from and after the expiration of one year from the testator's death or from and after any earlier time when the legacy should have been set aside and appropriated. And as matters have turned out neither Reginald nor his estate has ever become entitled to a penny piece in respect of the income of the legacy. In my judgment this amounts to a failure of the interest by reason of death before it became an interest in possession. It may no doubt be true that the section was primarily aimed at reversionary interests in the ordinary sense, which fail or determine during the existence of some prior interest. But I see no reason for restricting the ordinary meaning of the language of the section so as to limit its operation to such reversionary interests only. Counsel was constrained to admit on behalf of the Commissioners of Inland Revenue that if the testator had expressly fixed a period for the setting apart of the legacy, such as a year or two years, and had provided that no income was to accrue thereon in the meantime, the case would have fallen within the sub-section. And I think that the sub-section must equally apply where the failure of the first intended beneficiary to enter into the enjoyment of any income was due not to any express provision of the testator, but to the ordinary legal consequences of his gift. Regard must be had to the substantial results of the interests given without too

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close insistence on legal technicalities, as was pointed out by Palles C.B. in *Attorney-General* v. *Power*. (1) I hold, therefore, that estate duty did not become payable on the 30,000*l*. legacy on the death of Reginald.

Solicitors: *Williams & James; Rawle, Johnstone & Co., for J. W. Carter, Blackburn; Treasury Solicitor.*

A. C.

SARGANT J. 1918 *July* 17.

In re ASHLEY & SMITH, LIMITED.

ASHLEY *v.* THE COMPANY.

[1916 A. 494.]

Company—Debenture-holders' Action—Appointment of Receiver—Preferential Payments—"Servant" Contributors to Newspapers—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 107, 209.

Where a person is doing work for another away from the latter's place of business, and is not exclusively employed by the latter, and is only bound to do a particular class of work, and is not working under the control or subject to the commands of the latter, these four circumstances, and possibly the last one alone, will prevent the person employed from being a "clerk or servant" within the meaning of s. 209 of the Companies (Consolidation) Act, 1908.

This ruling applies so as to exclude outside contributors to a newspaper from the right to preferential payment in the winding up of a company and in proceedings to realize debentures secured by a floating charge.

IN this action, which was brought to enforce the security of holders of debentures (creating a floating charge) of the company (the proprietor of a newspaper called the *Sportsman*), an inquiry was directed what creditors were entitled to payments in priority over the claims of the debenture-holders under ss. 107 and 209 of the Companies (Consolidation) Act, 1908, which give a right to preferential payment in the case of clerks, servants, workmen, and labourers when the company is in winding up, or when a receiver has been appointed on behalf of the holders of debentures secured by a floating charge.

(1) [1906] 2 I. R. 272, 280.

The categories under which claims were alleged to be due were : " A, amounts due to contributors in respect of articles, and (or) items of news supplied to the *Sportsman*, to be paid for at a recognised rate or fee for each article or item," and " B, amounts due to contributors (being regularly employed) in respect of a continuous supply of articles, and (or) items of news, to the *Sportsman*, for which a fixed rate of remuneration was payable, either annually, quarterly, monthly, or weekly, in respect of the matter contributed, whether used or not."

One claimant, H. Huggins, was employed for about twenty years before March, 1916, by the company to report sporting events, particularly coursing meetings, at the rate of 15*s.* a day for every meeting, and 7*s.* 6*d.* a " draw." His accounts were sent in monthly, and were regularly paid up to December, 1915. He had only a verbal contract with a former manager of the company, but he had always been recognized as the " representative " of the *Sportsman* in the Gravesend district. His contention was that he was not a mere occasional contributor, but was under an obligation to the company to report the coursing meetings and draws in his district, and " the prospects of the various competing greyhounds " ; and that, although there had been no agreement as to this, his employment could not have been determined without reasonable notice from himself or the company. The former managing director, however, said, with reference to the term " employment " used by Huggins, that that gentleman was never in any sense a member of the staff of the *Sportsman*, but was only an outside contributor, paid according to the work done by him ; that he was under no obligation to report ; and that no notice to terminate the connection was required on either side.

The other claimant, Lowingham Hall, an author, had been continuously engaged as coursing correspondent to the *Sportsman* for about forty years before the appointment of the receiver and manager. His work was to report coursing meetings and write weekly articles from about September in each year until the following year, and to report the Waterloo Cup Meeting, and to deal with any events and questions connected with coursing which arose in the summer months. It had been the practice to pay him one-half of what he called his " salary " in December or January, and the other half in March.

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The salary had been reduced at different times, and early in September, 1915, the late managing director and Hall arranged that the work should be confined to contributing twenty-one weekly articles, to "analysing" the runners for the Waterloo Cup, and to reporting that event, and to the usual work in the summer months, and that Hall was to be paid 150*l.*, that sum being calculated on the basis of 5*l.* an article and 50*l.* for the report and review of the Waterloo Cup and the summer work. The Waterloo Cup was run on three days in February, 1916, and Hall's contributions ended on March 4, 1916. The late managing director in January, 1916, paid Hall 60*l.*, a sum on account, and the latter now claimed that 90*l.* was due to him by the company when the receiver and manager was appointed.

Romer K.C. and *R. H. Hodge* for the plaintiffs in the action. Huggins has been selected as representing category A and Hall as representing category B. Sect. 107 of the Companies (Consolidation) Act, 1908, extends to the case of a company against whom a receiver has been appointed on behalf of the holders of debentures secured by a floating charge the provisions as to preferential debts in a winding up contained in s. 209 of the same Act. By the latter section priority is given to the "wages or salary of any clerk or servant" and the "wages of any workman or labourer." It is clear that neither Huggins nor Hall was a clerk, or a workman, or a labourer, and it is submitted that neither of them was a servant of the company. Neither was bound to send in contributions, and the company was not bound to insert what either of them sent in.

Dighton Pollock for Huggins. This claimant was employed by the company to do certain work for it for which he was paid according to a regular system; and he was a "servant" within the meaning of s. 209. His position was similar to that of Mrs. Roberts, who was held to be a clerk or servant in *In re Beeton & Co.* (1), and not to that of Miss Hatchell and Mrs. Peel, who in the same case were held to be mere contributors to a periodical and not clerks or servants. Huggins was paid a certain sum for each piece of work done by him, just as the operatic artist, who was held to be a servant in *In re Winter German Opera, Ld.* (2), was paid a certain sum for each performance. A chemist employed to do specified work on three

(1) [1913] 2 Ch. 279. (2) (1907) 23 Times L. R. 662.

days of the week for regular hours, the remainder of the week being at his own disposal, was held to be a clerk or servant: *In re G. H. Morison & Co.* (1) Huggins, though not employed for fixed hours, was employed for fixed occasions. [He also referred to *Simmons* v. *Heath Laundry Co.* (2), *Walker* v. *Crystal Palace Football Club* (3), and Buckley on Companies, 9th ed., p. 482.]

G. R. Northcote for Hall. This claimant was not an occasional contributor. Besides being regularly employed as a coursing correspondent, he was a writer of articles for the paper, and in both capacities had to conform to the control of the editor.

Romer K.C. in reply. In both of the cases there is a total absence of control over the contributors, and the power of control "is the most important factor in determining whether the relation between two persons is that of master and servant": Clarke's National Insurance, 2nd ed., p. 8. The Insurance Commissioners have decided that a person employed to write for a newspaper a weekly article for which a fixed weekly sum is paid, the article being required to deal with local sport, but no other instructions being given, need not be insured under the National Insurance Act, 1911. [He also referred to *Scottish Insurance Commissioners* v. *Edinburgh Royal Infirmary* (4) and Adshead Elliott on the Workmen's Compensation Act, 7th ed., pp. 254, 257.]

SARGANT J. I have to decide here whether two persons who rendered services to the company are or were in the position of being servants of the company. The claim is made under s. 107 of the Companies (Consolidation) Act, 1908, which applies to a debenture-holders' action to enforce a floating charge the provisions of s. 209 of the same Act with reference to preferential payments in a winding up. That section provides that there shall be a preferential payment of certain debts including "all wages or salary of any clerk or servant"; and then later, "all wages of any workman or labourer." I read that later part of the section because its language shows that the term "servant" is not being used in any exceptionally large sense in the earlier part of the section. A large number of persons had claims against

(1) (1912) 106 L. T. 731.
(2) [1910] 1 K. B. 543, 547.
(3) [1910] 1 K. B. 87.
(4) 1913 S. C. 751.

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the company somewhat similar to the claims of Mr. Huggins and Mr. Hall, and, with a view to preventing multiplicity of proceedings, Younger J. gave directions under which notices were sent out to these persons, and it was attempted to class them under certain categories, and Mr. Huggins has been selected as representing A category and Mr. Hall as representing B. As a matter of fact, I do not think that there is very much distinction between category A and category B, or that Mr. Huggins and Mr. Hall do correctly represent different categories of the kind in question. They were in positions somewhat similar to, but not quite coincident with, the position of persons such as are mentioned in categories A and B. I must not attend to categories A and B at all, but decide the case of Mr. Huggins and the case of Mr. Hall, and those decisions, while not being binding on any other persons, may throw light on the position of persons who are in a somewhat similar position.

Now the facts about Mr. Huggins are that he is a justice of the peace, and an alderman of the borough of Gravesend. He says in his affidavit: "For about the past twenty years until March, 1916, I was in the employment of the above-named company for the purpose of reporting sporting matters and particularly in connection with coursing meetings. The terms of my appointment were at the rate of 15*s.* per day for every meeting and 7*s.* 6*d.* a draw." He then says that accounts were submitted monthly to the company and that there is an arrear of something over 12*l.*, which constitutes his claim against the company; that there was no formal contract, but that the matter was verbally arranged. He further says that he was always regarded as a representative of the *Sportsman* in the Gravesend district, and that all official communications were sent to him as such for transmission to the paper. Then he states that he was not only merely an occasional contributor, but that he was under an obligation to the company to report all coursing meetings in the district and also the draws; and he claims that he was a servant in the employ of the company. There is some little dispute of fact in this sense, that the representative of the company says that as a matter of fact Mr. Huggins was not under any obligation to report; that he could have stopped it at any time without any breach of contract, and that the arrangement was only one

under which he did in fact report as long as he thought fit; but I will take it in favour of Mr. Huggins that he was under some obligation.

The facts with regard to Mr. Hall were that for about forty years prior to the appointment of a receiver he had been continuously engaged as coursing correspondent of the *Sportsman*, his work being to report coursing meetings, and to write weekly articles from about the month of September in each year until the following March; to report the Waterloo Cup Meeting, and to deal with any events and questions connected with the sport of coursing which arose during the summer. Then he says that he had a recognized signature for the paper, and that he had a fixed salary, which gradually was reduced as the affairs of the paper became less prosperous. He further says that there was owing to him a balance of about 90*l.* at the date of the appointment of the receiver, and he is making a preferential claim in respect of that matter.

The question is whether those two persons were servants of the company within the meaning of s. 209. A large number of cases have been cited to me, but it is unnecessary for me to go through them, or to differentiate the present case from those cases; and in fact I think that would be a wrong way of working altogether, and would only lead to confusion. I must consider whether the main indications of service are present here or not; and having done so I have come to the conclusion that neither of these persons was a servant of the company. I particularly note four circumstances. In the first place, they were working entirely away from the company, and not in the office of the company at all. Secondly, they were not exclusively employed in the service of the company, but they might have taken up any amount of other work for other persons, and I think it is highly probable that they did so. Thirdly, they were not bound to render services generally, but only a particular class of service. Fourthly, and most important of all, they might perform the service in question practically as they pleased; they were not working under the control of the company or subject to the command of the master under whom they worked. I do not say that any one of those four circumstances which I have mentioned, except possibly the last, would be entirely conclusive; but I do think that, when all those four circumstances

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are taken together, it is impossible to say that either of those persons was a servant of the company; and I think that prior to this appointment of a receiver either of them—certainly Mr. Huggins at least, and I think also Mr. Hall—would have been very much surprised and distressed if he had been spoken of as a servant of the company.

In my judgment, therefore, neither of these persons is entitled to the amount claimed as a preferential claim; but as they have been brought here for the purposes of facilitating the administration of the affairs of the company and were added as representative persons, they are entitled to their costs, their costs as between solicitor and client, to be paid out of the assets, and the plaintiffs' costs will be their costs in the action.

Solicitors for Huggins: *Speechly, Mumford & Craig.*
Solicitors for Hall: *Soames & Vigo.*
Solicitors for plaintiffs: *Gush, Phillips, Walters & Williams.*

F. E.

YOUNGER J. 1918 *May* 6, 7, 14, 15; *July* 16.

In re COUTINHO CARO & CO., ENEMY.

[1917 C. 1260.]

War—Trading with the Enemy—Enemy Firm—"Branch"—Trading with the Enemy Proclamation, No. 2, clause 6.

A Hamburg firm before the war accepted, through its office in London, orders from British customers for delivery of iron and steel goods at future dates which, in the event, were after the outbreak of war. Delivery was not made:—

Held, that the contracts were dissolved on both sides on the outbreak of war, and were not revived by an order being subsequently made, and a controller appointed, for winding up the firm's English business under the Trading with the Enemy Amendment Act, 1916.

Semble, an office of an enemy firm, of which the headquarters are in the enemy country, opened in this country under a manager for the convenience of British customers and for the development of business between them and the firm abroad is not a "branch"

of the firm within the Trading with the Enemy Proclamation, No. 2, clause 6.

Semble, the business of a "branch" must not involve any dependence on headquarters in enemy territory.

SUMMONS.

The question was whether certain claims had been rightly rejected by the controller in the winding up of an enemy business under the Trading with the Enemy Amendment Act, 1916, and was mainly one of fact; but the further question was considered whether the business was a "branch" within the meaning of the Trading with the Enemy Proclamation, No. 2, dated September 9, 1914. (1)

The facts are fully set out in the judgment.

Austen-Cartmell for the controller.
Luxmoore for a claimant.
Stuart Bevan for another claimant.

YOUNGER J. In this case I have to determine whether the controller appointed by order of the Board of Trade dated May 8, 1916, to wind up the business in this country of Coutinho Caro & Co., for many years carried on at 134, Fenchurch Street, in the city of London, has rightly rejected the claim of Mr. John McSkimming, of Glasgow, to be admitted as a creditor of the business for 540*l.* 15*s.* 11*d.*, and the claim of Messrs. William Menzies & Co., of 165, Fenchurch Street, to be admitted as creditors for 33,882*l.* 6*s.* 3*d.* If these claims are both of them valid—and they are not in principle distinguishable from each other—the assets of the business in the hands of the controller will not suffice to meet them in full. The question at issue is, therefore, of great importance to the controllership, apart from the magnitude of the sums involved.

The claims in each case are in respect of damage which it is

(1) The Proclamation, after warning all persons in His Majesty's Dominions against transactions with an enemy, provides (clause 6): "Where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions . . . . with such branch shall not be treated as transactions . . . . with an enemy"

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alleged the claimants have respectively sustained by reason of the failure of the owners of this business to make delivery after the outbreak of war of considerable quantities of iron and steel goods, orders for which had been accepted by the firm before the war for delivery at future dates specified and to be specified, all of which, with one trifling exception, were, in the event, subsequent to the outbreak of hostilities. With regard to some of the deliveries directed by Messrs. Menzies, these were to be made by the Hansa Line of steamers, an enemy-owned concern, with which no business after the war could legally be transacted ; and in the course of the argument it was admitted by Mr. Stuart Bevan, on behalf of Messrs. Menzies, that to the extent to which their claim represented damages for these non-deliveries it must fail. That admission reduces their claim by several thousands of pounds. The claims, however, even as reduced, met with many answers from the controller, some of them involving a critical examination of the different accepted orders under which the successive deliveries were to be made. But it will not be necessary to deal with these answers in detail, if the contention on which Mr. Austen-Cartmell mainly relied, as to the true status of this business, be well founded. He said that the contracts upon which the claims rest were all of them in fact made with an enemy firm ; that on the outbreak of war these contracts became illegal and were dissolved ; and that any claim in respect of breaches of contracts no longer in existence must fail. He says that on the authorities this result follows even if this British business of Coutinho Caro & Co. was a "branch" of the main business of the firm at Hamburg in the sense in which the term is used in the Proclamation of September 9, 1914. But he says that in fact the business was not in any such sense, and certainly not in relation either to the conclusion or performance of the contracts here in question, a branch of that business, and that accordingly these contracts, for that in addition to other reasons, are in no way transactions protected by the Proclamation. As it is manifest that if these contentions, or any of them, are well founded the case of the claimants is at an end, I proceed at once to examine, from Mr. Austen-Cartmell's point of view, the position of the firm and the general features of the contracts.

The facts in relation to the firm and its business were very

clearly proved in the evidence of Mr. William John Carter, who had for nearly ten years before the war been one of the managers at Fenchurch Street. Up to June, 1914, the partners in the firm owning that business were Felix Coutinho and Herr von Holten. In June, 1914, Herr von Holten retired from the firm, and in July, 1914, one Robert Caro joined Felix Coutinho in the partnership. The firm name up to that time had been Coutinho & Co.; it was then changed to Coutinho Caro & Co., and under that style the business was being carried on at the outbreak of war. The partners had all along been and were then resident at Hamburg. The headquarters of the business were at Hamburg. The firm had establishments, to use a neutral term, at Antwerp and in London, but the entire direction proceeded from Hamburg. The business of the firm was that of iron and steel merchants. They had no works of their own. They dealt exclusively in the products of others, and for the most part in iron and steel produced in Germany and Belgium. No partner ever resided in London. The tenancy of the business premises there was in the name of the firm; the operations were conducted by two joint managers, Mr. Carter and a colleague, who apparently was often changed but was always a German. The managers were paid by salary and not by commission, and for this reason Mr. Carter, it seems, considered the concern here to be a branch as distinct from an agency. The main business done at Fenchurch Street was the receiving of orders from British traders for the supply of steel and iron goods of Continental origin. These orders represented 95 per cent. of the total business done. The remaining 5 per cent. consisted in the purchase and sale of galvanized iron sheets manufactured in England. Every individual contract or transaction in both classes of goods was, however, submitted to Hamburg for sanction before being accepted or entered into here. Except within the narrowest limits, and then only from time to time, the English managers had no power to accept any orders without direct instructions from Hamburg, obtained usually by cable. In relation to the business in goods of Continental origin, all orders received at Fenchurch Street were automatically sent on to Hamburg. All goods were invoiced from Hamburg, the invoices being posted thence to London, to be sent on from there unaltered to the customers. All purchases for the

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fulfilment of British orders were made by the Hamburg house; all payments for the goods were made from Hamburg. The shipment and insurance of the goods and all other matters in relation to the fulfilment of the contracts were directed from there. The books of the business were kept at Hamburg. There was not even a cash-book in London. There was, however, an account with the National Bank. It was in the name of the firm, the London managers as well as the members of the firm having authority to draw cheques on it. The moneys received from British customers for goods supplied to their order were paid in to the credit of this account, but the only payments out were for the salaries and other expenses of the London business and the payments in respect of the galvanized iron sheets purchased and resold as above described. All other moneys to the credit of this account were from time to time remitted to the firm at Hamburg. In short, the words of the Lord President in *Orenstein & Koppel* v. *Egyptian Phosphate Co.* (1), with slight adaptation, exactly fit the present case. The servants of the firm in London "solicit orders, transmit orders when received to Germany for execution, and when the orders are executed they collect the payments from British customers, and transmit the money to Hamburg." That is what happened in relation to all the accepted orders here in question. They were all of them for iron and steel goods which, as was either contemplated by both parties or actually prescribed, were to be represented by goods of German or Belgian origin shipped from German or Belgian ports. They were all of them invoiced from Hamburg. In the completion of the orders the London managers would take no part. They had neither power nor, as between themselves and Hamburg, responsibility in the matter.

Now the result of all this, in my opinion, is that this business in London would, in popular parlance, be called neither a branch nor an agency of the German firm. It was indeed nothing more than an office of that firm, opened in this country under a manager for the convenience of the British customers of the firm and the development of business between them and the firm in Hamburg. And in my opinion all the contracts here in question were in every sense of the word contracts with that Hamburg firm, and upon the

(1) 1915 S. C. 55, 60.

outbreak of war they were every one of them dissolved on both sides. To my mind, this is a much stronger case than *Wolf & Sons* v. *Carr, Parker & Co.* (1), in which that consequence was held by the Court of Appeal to attend the contracts there. Nor is that consequence, in my opinion, affected by the subsequent order for winding up this British business and the appointment of a controller. The decision of Atkin J. in *Coutinho Caro & Co.* v. *Vermont & Co.* (2) is not a decision that such an order and appointment operate to revive dissolved contracts.

If I be right in this conclusion, it is unnecessary to go further. It is immaterial, and if the true view be that the Proclamation of September 9 protects only transactions with a branch entered into since the outbreak of war (see *Wolf & Sons* v. *Carr, Parker & Co.* (1) and *Orenstein & Koppel* v. *Egyptian Phosphate Co.* (3)), it is irrelevant to determine whether or not this business was a branch within the meaning of the Proclamation. But lest, as I think may well be the case in view of the further consideration which this whole subject has since received, the view just stated may hereafter receive reconsideration in the Court of Appeal, it is well I should state that, in my opinion, this London business is in no sense of the Proclamation a branch of the enemy firm, and, even if for some purposes it were, these contracts would not, in my opinion, be transactions of the branch which would be entitled to protection under it. I do not propose to essay the task, from which every one has hitherto shrunk, of attempting to define what a branch is. One may, however, feel clear as to some things that are not branches, and, when one sees that a branch whose transactions are protected must be situated "in British, allied or neutral territory, not being neutral territory in Europe," one sees, I think, that the business, if it is to be recognized, must involve no dependence upon headquarters in enemy territory. No transaction involving such dependence would be legally possible if the branch were in British or allied territory: none would be practicable, the British Navy remaining in being, if it were in neutral country out of Europe; and the provision that the privileged branch must not be situate in neutral territory in Europe is, I think, plainly due to

(1) [1915] W. N. 195; 31 Times L. R. 407.

(2) [1917] 2 K. B. 587.

(3) 1915 S. C. 55.

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the fact that the dependence of such a branch upon headquarters could not be prevented by the forces of the Crown, and for that reason no transaction at all with it is permitted.

Now the management of this London business had no initiative or authority; it could do nothing of its own motion, it received orders and it received payments, everything else was carried out at Hamburg. For the initiation or fulfilment of every transaction it was dependent upon Hamburg. In my opinion, therefore, it was not a branch within the meaning of the Proclamation. The admission in the case before Atkin J. that it was is probably attributable to the view of Mr. Carter already referred to. But, further, if it was such a branch, these particular contracts would not, in my opinion, even if they could possibly have been made after the war—they could not, for Mr. Carter had no, nor would he have assumed any, authority to make them—have been transactions with a branch permitted by the Proclamation. A branch in this country of an enemy business is not by the Proclamation put in a more favoured position than any other person resident or carrying on business in British, allied, or neutral territory out of Europe, and any transaction with such a person which, in the language of Swinfen Eady L.J. in *Zinc Corporation* v. *Hirsch* (1), "would involve intercourse with the enemy" would be illegal. The fulfilment of these contracts by the firm involved constant intercourse with the enemy if they were to be carried out in manner contemplated by both parties to them when not so prescribed. Therefore, on that ground also the contracts have, in my opinion, been dissolved as from August 4, 1914, even if the better view of the Proclamation is hereafter held to be, in accordance with what would be my own view if it were open to me to express it, that the fulfilment after the war of a transaction with a branch entered into before the war is lawful if the transaction itself would under the Proclamation be permissible after the war.

It follows that, in my judgment, both claims have been rightly rejected.

Solicitors: *Hurd, Crook & Jones; Maples, Teesdale & Co.; McKenna & Co.*

(1) [1916] 1 K. B. 541, 556.

A. L.

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June 12, 18, 25.

In re LEWAL'S SETTLEMENT TRUSTS. GOULD *v.* LEWAL.

[1917 L. 1512.]

Power of Appointment—Marriage Settlement—English Infant Wife—French Husband—Wife's general testamentary Power of Appointment—Construction of Settlement according to English Law—French Domicil—Unattested French Holograph Will by Wife when Nineteen—Husband appointed "Légataire Universel"—Valid Exercise of Power—Extent of Property appointed—French Law—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27.

By an unattested holograph will made in France in 1907, the English wife, aged nineteen, of a Frenchman domiciled and resident in France appointed him her "légataire universel." At the time of her death in 1917, and in the events which had happened, the wife had under her marriage settlement, made in England and duly sanctioned under the Infants' Settlement Act, 1855, a general power of appointment over the settled funds "by will or codicil executed in such manner as to be valid according to the law of her domicil or by any writing purporting to be a will or codicil executed in such manner that the same would be valid as such according to the law of England if she were at the time of her death domiciled in England." The settlement contained a declaration that it should be construed and the rights of all parties thereunder should in all respects be regulated according to the law of England. Administration with the will annexed had been granted in England to the husband's attorney.

According to the law of France the document was a valid will, but inasmuch as at the time of making it the wife was a married woman over sixteen but under twenty-one years of age, she was competent to dispose by will of only one-half of the property of which she would have been able to dispose if she had been twenty-one years of age:—

Held: (1.) that the effect of the declaration was not to restrict the testamentary capacity of the wife to full age according to the law of England, and that the will, being a good will according to the law of France, was within the contemplation of the settlement as an instrument by which the power could be exercised, notwithstanding that the wife was under twenty-one when she made it.

(2.) That s. 27 of the Wills Act, 1837, could be invoked for the purpose of interpreting the French will, and that the power had been effectually exercised by the disposition therein contained of the wife's estate in general words.

In re Simpson [1916] 1 Ch. 502 and *In re Wilkinson's Settlement* [1917] 1 Ch. 620 adopted and applied.

In re D'Este's Settlement Trusts [1903] 1 Ch. 898 and *In re Scholefield* [1905] 2 Ch. 408 not followed.

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(3.) That inasmuch as by French law the testamentary capacity of the wife was in the circumstances limited to one-half only of the property of which she could have disposed if she had been twenty-one years of age at the time of making her will, her will only operated on one-half of the property subject to the power, and that the other half went as in default of appointment.

ADJOURNED SUMMONS.

By a settlement made in 1907 upon the marriage of Gertrude H. G. Loyd, an infant aged nineteen, to the defendant Maxime Léon Lewal, an officer in the French Army, certain property belonging to the intended wife was settled after her death, and in the event (which happened) of there being no child of the marriage who attained a vested interest, upon trust for such person or persons and for such purposes as the wife should while discovert by deed, or whether covert or discovert, by will or codicil "executed in such manner as to be valid according to the law of her domicil, or by any writing purporting to be a will or codicil executed in such manner that the same would be valid as such according to the law of England if" the wife "were at the time of her death domiciled in England appoint and so that such deed will codicil or writing shall be valid whether she shall be covert or sole," and in default of and subject to any such appointment, in trust, if her husband survived her, for such person or persons as would have become entitled to her property under the Statutes of Distribution at the death of the wife had she died possessed thereof intestate domiciled in England and without having been married, such persons, if more than one, to take as tenants in common in the shares in which they would have taken under the same statutes.

The settlement contained an agreement and declaration by all the parties thereto, and particularly by the husband, that the settlement should be construed, and that the rights of all persons claiming thereunder should in all respects be regulated, according to the law of England in the same manner as if the husband were at the date of the settlement domiciled in England and as if the husband and wife were to remain thenceforth during their respective lives domiciled in England. The intention of the parties to the settlement had already been set forth in a recital to an effect precisely similar to that contained in the last-mentioned declaration.

The settlement was duly sanctioned by the Court under the

Infants' Settlement Act, 1855, and the marriage was solemnized on April 15, 1907. The husband was at the time of the marriage and had ever since remained a French citizen resident and domiciled in France, and throughout their married life the husband and wife were domiciled in France.

After the marriage, the wife, then nineteen years of age, signed at Versailles an unattested French holograph will as follows:—"J'institue mon mari pour mon légataire universel. Fait à Versailles le 15 Avril, 1907." The wife died in France in June, 1917, in the lifetime of the husband and without having had any child who attained a vested interest in the settled funds. On May 22, 1918, letters of administration with the French will annexed were granted in this country to the wife's mother as attorney of the husband.

This was a summons on behalf of the trustees of the settlement for the determination of the question whether and to what extent the will operated as an exercise of the general power of appointment given to the wife by the settlement.

The evidence showed that the will was in point of form a valid will according to French law, and that as the wife at the time of making her will was a married woman over sixteen but under twenty-one years of age, she was, under French law, competent to dispose by will of one-half of the property of which she would have been able to dispose if she had been twenty-one years of age.

Attwater for the plaintiff stated the case.

Hughes K.C. and *Underhill* for the defendant husband. This will, being a will valid according to the law of the domicil of the testatrix and having been admitted to probate in this country, is effectual to operate as an exercise of the general power of appointment provided that the terms of the will are sufficient: *D'Huart* v. *Harkness* (1); *In re Price* (2); Farwell on Powers, 3rd ed. p. 152.

The terms of this will are wide enough to operate under s. 27 of the Wills Act, 1837, as a valid exercise of the power: *In re Simpson* (3); *In re Wilkinson's Settlement* (4); Dicey's Conflict of Laws, 2nd ed. p. 821. The views expressed in those two decisions are, we submit, to be preferred to the views expressed in *In re*

(1) (1865) 34 Beav. 324.
(2) [1900] 1 Ch. 442.
(3) [1916] 1 Ch. 502.
(4) [1917] 1 Ch. 620.

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D'Este's Settlement Trusts (1) and *In re Scholefield.* (2) Under the general law, therefore, and also by the express provision of the settlement under which it is to be construed and the rights of all parties are to be regulated according to English law, we submit that the power was well exercised and that the husband is entitled.

Tomlin K.C. and *Dighton Pollock* for the defendant next of kin. This settlement gave the wife no power which she could exercise while still an infant. An intention cannot be gathered from this settlement that the power should be exercisable during minority as it was in *In re Cardross's Settlement.* (3) On the contrary, this settlement was to be construed, and the rights of all parties determined, according to English law, and under that law the wife during minority had no testamentary capacity and could not make a will exercising the power. That clause deals only with the form or means by which the power is to be exercised, and not with the question of testamentary capacity. The decisions in *D'Huart* v. *Harkness* (4), *In re Kirwan's Trusts* (5), *Hummel* v. *Hummel* (6), *In re Price* (7), and *Barretto* v. *Young* (8) all turned upon the means by which the power was to be executed, not upon the testamentary capacity of the donee of the power, and in *In re Kirwan's Trusts* (5) and *Hummel* v. *Hummel* (6) there was the further distinguishing fact that the wills in those cases had only been admitted to probate in this country under Lord Kingsdown's Act.

If the Court is against us on that point, then we submit further that, as the will did not refer either to the power or the property, s. 27 of the Wills Act, 1837, cannot be invoked for the purpose of interpreting a French will. Powers of appointment are unknown to French law. On this point we submit that the decisions in *In re D'Este's Settlement Trusts* (1) and *In re Scholefield* (2) cover and govern this case and are to be preferred to the observations in *In re Simpson* (9) and *In re Wilkinson's Settlement* (10), in the former of which the will was in such a form as to enable the Court to deal with it according to *In re Price* (7), and in the latter the power was a special power, so that what the learned judge said with regard to a

(1) [1903] 1 Ch. 898.
(2) [1905] 2 Ch. 408.
(3) (1878) 7 Ch. D. 728.
(4) 34 Beav. 324.
(5) (1883) 25 Ch. D. 373.
(6) [1898] 1 Ch. 642.
(7) [1900] 1 Ch. 442.
(8) [1900] 2 Ch. 339.
(9) [1916] 1 Ch. 502.
(10) [1917] 1 Ch. 620.

general power was obiter. Moreover, there is a difference between power and property, and property appointed under a general power does not pass to the executor as such: *O'Grady* v. *Wilmot.* (1)

There has been no valid execution of this power, in which case the whole fund goes as in default of appointment. The next of kin will in any case be entitled to one-half the fund, because the testatrix being under twenty-one could only, according to French law, dispose of one-half of her property.

Cur. adv. vult.

June 25. PETERSON J. stated the facts, and continued: The question is whether this will operated as an exercise of the wife's general power of appointment, and if so, to what extent. It has been proved that this in point of form is a valid will according to French law, and that as she was, when she made her will, a married woman over sixteen and under twenty-one years of age, she was, under French law, competent to dispose by will of one-half of the property which she would have been able to dispose of if she had been twenty-one years of age.

It was contended, in the first place, that as she was, when she made her will, under twenty-one years of age, she could not thereby exercise the power of appointment at all, and reliance was placed on the provision that the rights of all parties claiming under the settlement were to be regulated by the law of England in the same way as if both husband and wife had throughout been domiciled in England. It could not be disputed that a holograph French will might operate as an exercise of the power, as it was expressly within the terms of the settlement, and if it had not been expressly provided for it would, on the authorities, be a will which was recognized in England as valid and therefore a will capable of exercising the power. But it was urged that the provisions in the settlement only related to the form of this will and did not affect the question of testamentary capacity, and that this question must be determined by English law, as the rights under the settlement were to be regulated by English law as if the husband and wife had been domiciled in England. This argument, in my opinion, is unsound. The settlement expressly enables the power of appointment to be exercised by Madame Lewal by a will executed in such manner as to be valid

(1) [1916] 2 A. C. 231.

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according to the law of her actual domicil as well as by a will executed in such manner as to be valid as such according to the law of England. It obviously contemplated that she should be able to exercise the power by a French will which might not comply with the requirements as to wills of the English law. Nor do I think that this provision related merely to the form of the will and to the presence or absence of attesting witnesses. What the settlement contemplated was a will which should be valid according to French law or a will which would be valid according to English law. This will is a good will according to French law notwithstanding the fact that Madame Lewal was under twenty-one years of age when she made it. This objection therefore, in my opinion, fails.

The next objection was that the will did not, in fact, exercise the power. It does not refer to the settlement or to the property comprised in the settlement, and it was said that s. 27 of the Wills Act cannot be invoked for the purpose of interpreting a French will. This contention has given rise to a considerable difference in judicial opinion. In *In re D'Este's Settlement Trusts* (1) Buckley J. held that a will by a domiciled Frenchwoman, which appointed her husband her universal legatee and bequeathed to him all her personal estate, did not operate as an exercise of a general power of appointment, and that reference could not be made to s. 27 of the Wills Act for the purpose of interpreting the will, as the section was intended as a statutory rule for the interpretation of English wills and could not be applied to the interpretation of foreign wills, which must be construed according to the law of the domicil. This decision was followed by Kekewich J. in *In re Scholefield.* (2) These two cases were, however, subjected to a very destructive criticism by Neville J. in *In re Simpson* (3), where it was held that an unattested holograph will of a British subject domiciled in France, by which she disposed of all the property and rights comprised in her estate, effectually exercised a general power of appointment which she had over the trust funds under the English settlement, the learned judge expressly dissenting from the decisions in the two earlier cases. In *In re Wilkinson's Settlement* (4) Sargant J. (although the point seems to have been unnecessary for the decision of that case) agreed with

(1) [1903] 1 Ch. 898.
(2) [1905] 2 Ch. 408.
(3) [1916] 1 Ch. 502.
(4) [1917] 1 Ch. 620.

the opinion of Neville J. and added some further reasons for disagreeing with the view of Buckley J. and Kekewich J. In these circumstances I am at liberty to express my own opinion. The judgment of Buckley J. is summarized in the following passage from his judgment (1): "Then it is said that I must take this French document and read it, not as a will in the sense in which I have explained, but as if the directions contained in it were introduced into the instrument which contained the power. That is quite right: but how must I read it? I have, referentially, to introduce into the instrument which contains the power a foreign document. I have to see whether the power was exercised, and therefore to find out the meaning of what is expressed by the donee of the power. Now how am I to ascertain the meaning of the donee of the power? I must ascertain it according to the law of the place applicable to the document executed by the donee, and to the domicil of that person, and that law is to be taken as the law governing its construction. If I do that, I have to read the French will and say what its meaning is according to the principle of French construction, excluding, therefore, s. 27, which is a rule for English construction." With all respect to the learned judge, it appears to me that his conclusion does not necessarily follow from his premisses. If the French will was to be interpreted according to the principles of French construction it did not follow that s. 27 of the Wills Act was to be excluded. As pointed out by Neville J., the French Court does not know anything of powers of appointment and would require to be informed what a general power of appointment was and in what manner it might be exercised, and the answer to this question must involve the effect of s. 27. A further argument indicated, I think, by Sargant J. in *In re Wilkinson's Settlement* (2) against the view of Buckley J. may be put in this way. Prior to the Wills Act the exercise of a general power of appointment by will had to refer either to the power or to the property subject to the power. After that Act the power could be exercised by a will which disposed of the personal estate of the appointor. This, in effect, amounted to a provision that every general power of appointment by will should be read as a power to appoint by a will which referred to the power, or to the property subject to the power, or disposed of the personal estate of

(1) [1903] 1 Ch. 903. (2) [1917] 1 Ch. 620.

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the appointor in general words. The result then would in the present case be that the power authorized the appointment by a valid French will which disposed of the appointor's estate in general terms and the will of Madame Lewal would be an exercise of the power. I agree with the opinions of Neville J. and Sargant J., and therefore hold that the general power of appointment was exercised by the will of Madame Lewal.

I may add that in the present case there seems to be an additional reason why a French Court, on being asked to determine whether the will operated as an exercise of the power of appointment, would be bound to ascertain what the English law on the subject was. In order to determine the question it would be necessary to refer to the settlement which contained the power in order to see what was authorized by the power, and it would then be found that the settlement contained a provision that the rights of all parties claiming under it should be regulated in the same way as if the husband and the wife were and continued to be domiciled in England—a clear reference to English law.

The question, however, remains whether the will of Madame Lewal effectively appoints the whole of the fund subject to the power. On the evidence Madame Lewal, when she made her will, had only a limited testamentary capacity. She could only dispose of one-half of the property which she could have disposed of if she had been twenty-one. It appears to me that I am not concerned with the fact that one-quarter of her property went to her mother under art. 14 of the Civil Code. Her mother cannot claim a share of the settled funds unless they have been appointed to her or she takes under the settlement in default of appointment.

The result, in my opinion, is that, as Madame Lewal's testamentary capacity was limited in the way which I have mentioned, her will only operated on one-half of the funds which were subject to the power, and that the other half goes as in default of appointment.

Solicitors for all parties: *Smiles & Co.*

R. M.

ELECTRIC PAVILIONS (MARBLE ARCH), LIMITED *v.* LORDEN.

ASTBURY J.

1918

June 26.

[1917 E. 61.]

Emergency Legislation—Contract—Restriction under Defence of the Realm Regulations—Hardship of enforcing particular Form of Contract—Power to vary—Courts (Emergency Powers) Act, 1917 (7 & 8 *Geo.* 5, *c.* 25), *s.* 1, *sub-s.* 2.

Where owing to any restriction imposed under the Defence of the Realm Regulations any particular term of a contract cannot be enforced against any contracting party without serious hardship, the power of the Court under the Courts (Emergency Powers) Act, 1917, s.1, sub-s. 2, to "suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the Court may think fit" includes a power to vary or modify the liability of that party under the particular term during the continuance of the restriction.

ACTION.

By a building agreement dated October 22, 1912, and made between the intending lessor and the plaintiff Davis, the lessor agreed so soon as the present buildings were removed and the intended new buildings roofed in to the lessor's satisfaction, to grant two leases of two adjoining lots A and B to Davis, namely, as to lot A for ninety years from September 29, 1912, at a peppercorn rent for the first year and 2900*l.* rent thereafter, and as to lot B for eighty-eight and a half years from March 25, 1914, at a peppercorn rent for the first year and 2100*l.* rent thereafter, the rent for lot A being paid in advance up to September 29, 1914, and for lot B up to March 25, 1916. Davis agreed to pay the rents agreed to be reserved, and that the building agreement should remain in force as to any unperformed stipulations notwithstanding the grant of a lease. The building on lot A was to be completed by October 22, 1913, and the building on lot B by March 25, 1915.

Davis in fact entered into the agreement as agent for the plaintiff company, who shortly after entered and proceeded to erect the building on lot A.

By a lease dated October 27, 1914, and made between the lessor,

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Davis, and the plaintiff company, lot A was demised to the plaintiff company for ninety years from September 29, 1912, at a peppercorn rent for the first year, at 2900*l.* rent for the next one and a half years up to March 25, 1915, and thereafter at 5000*l.* rent until the lease of lot B was granted, and thereafter at 2900*l.* rent. The plaintiff company covenanted to pay the above rent.

At this time a cinema theatre had been erected on lot A, but lot B, which was due for completion by March 25, 1915, was still untouched. The lessor therefore insisted on securing the whole 5000*l.* on lot A for the time being.

By an assignment dated June 30, 1915, and made between Davis, the plaintiff company, certain mortgagees, a person entitled to an option over lot B, and the defendant, the estate or interest of Davis or the plaintiff company in lot B under the building agreement was, with the lessor's consent, assigned to the defendant, who covenanted with Davis and the plaintiff company thenceforth to pay all rent becoming due under the building agreement in respect of lot B and to perform the agreements therein contained in respect of lot B, and to indemnify Davis and his assigns against all claims on account of any omission to pay the said rent or any breach of the said agreements. As part consideration for this assignment the defendant repaid the plaintiff company the 2100*l.* already paid on their behalf for the rent of lot B up to March 25, 1916.

The defendant then entered and proceeded to erect a block of shops and flats on lot B and paid the quarter's rent due on June 24, 1916.

On July 14, 1916, the Minister of Munitions made an Order under the Defence of the Realm Regulations R. 8E. directing that after July 20, 1916, no person should without licence carry on any construction or building work the total cost of which exceeded 500*l.* The defendant was unable to obtain a licence and the building was stopped, so that the premises were untenantable and produced no rent.

From June 24, 1916, the plaintiff company were compelled to pay the full rent of 5000*l.* a year under their lease of lot A, but the defendant refused to recoup them in respect of the 2100*l.* attributable to lot B under the building agreement.

On January 25, 1917, the plaintiff company and Davis commenced

this action against the defendant for a declaration that under and by virtue of the assignment the defendant was bound to indemnify the plaintiffs against the 2100*l.* rent payable under the building agreement in respect of lot B, and for consequential relief.

The defendant took the point that the covenant for indemnity was inapplicable, as the whole 5000*l.* was payable under the lease in respect of lot A. Any claim against him by the lessor under the building agreement in respect of lot B would have been met by an application for relief under the Courts (Emergency Powers) Act, 1917. If, however, the covenant for indemnity was applicable, he applied for similar relief against the plaintiffs.

At the first hearing on March 13, 14, 1918, Astbury J. held that the covenant for indemnity was applicable, and declared accordingly. The case was then adjourned to see if any arrangement could be made with the lessor. The lessor's advisers, however, after most careful consideration, stated that, though it would have been contrary to their practice to require the defendant to pay the 2100*l.* rent of lot B under the building agreement during the building restrictions, in the present case they thought that lot A was in itself well worth the 5000*l.* a year reserved by the lease and the plaintiff company must pay it. The negotiations therefore proved abortive, and the case was set down on the application for relief.

The plaintiff company had been making large profits by their theatre since the war and were paying income tax and excess profits duty. If the defendant paid them the whole 2100*l.* the greater part would go in taxation, and they would only benefit to the extent of about 300*l.* a year. In other words, they were only losing 300*l.* a year by the non-fulfilment of the indemnity. The defendant offered to bear half this loss.

Micklem K.C. and *Percy Wheeler* for the defendant. The Courts (Emergency Powers) Act, 1917, s. 1, sub-s. 2, provides that "Where, upon an application by any party to any contract whatsoever, the Court is satisfied that, owing to any restriction or direction imposed or given by or in pursuance of any enactment relating to the defence of the realm or any regulation made thereunder . . . . any term of the contract cannot be enforced without serious hardship, the Court may, after considering the circumstances of the case

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and the position of the parties to the contract and any offer which may have been made by any party for the variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the court may think fit."

It is clear that this section impliedly authorizes the Court to vary, alter, modify, or adjust the terms of the contract and the rights and obligations of the parties; and to mitigate or lessen the amount of damages that a party may claim as his legal right for breach of contract. That is, at all events, the view taken by the Committee on Pre-War Contracts in their report of January 12, 1918, Cd. 8975, p. 6, and the section obviously also applies to post-war contracts.

The only question, therefore, is the basis of relief. If the plaintiff company had not accepted their lease of lot A at 5000*l.* rent the defendant would only have had to deal with the lessor under the building agreement, and the lessor would have excused him the 2100*l.* rent during the building restrictions. As it is, no part of the 5000*l.* has been paid on the defendant's behalf in respect of lot B, and he has no locus standi against the lessor. In these circumstances the defendant might fairly ask to be relieved from the whole 2100*l.* during the building restrictions, just as if the lease of lot A had not been granted. The defendant, however, is willing to bear half the actual loss, which, owing to income tax and excess profits duty, is only about 300*l.* a year, and relief should be granted on this footing, any payments made by the defendant to be in complete satisfaction of his liability under the covenant of indemnity during the building restrictions. The case is somewhat analogous to *Innholder's Co.* v. *Wainewright.* (1)

Cunliffe K.C. and *Sheldon* for the plaintiffs. The contract in this case is contained in the entire assignment. The Court can suspend or annul that assignment, but that is not what the defendant wants. He wishes to keep the benefit of the assignment, but to be relieved against some of his obligations thereunder. Now the Court can stay proceedings for the enforcement of any term of the contract including the covenant for indemnity, and to that the plaintiffs have no objection. But it cannot cancel the ultimate liability on that covenant for indemnity, which is only part of the larger con-

(1) [1917] W. N. 172. [Omitted in Current Digest.]

tract. That is a variation of the larger contract, and *pace* the Committee's report on pre-war contracts, it is not authorized by the section. The fact that the plaintiffs, owing to income tax and excess profits duty, will only be able to keep about one-seventh of the defendant's payments is irrelevant. He can only recoup their net loss of 300*l.* by paying the 2100*l.* in fulfilment of his covenant. If he only paid 150*l.* the plaintiffs could only keep 21*l.*

Micklem K.C. in reply.

ASTBURY J., after stating the facts and reading the section, continued: I cannot doubt that the assignment of June 30, 1915, and the defendant's covenants therein contained constitute a contract within the meaning of this section, and I am also satisfied that by reason of the Order of the Ministry of Munitions stopping the building on lot B the enforcement of a rent by way of indemnity or otherwise of 2100*l.* a year from the defendant under this contract would constitute a serious hardship.

The plaintiffs have since the war been making a very large or substantial income from the buildings and theatre erected on lot A, whereas the buildings on lot B, partially erected by the defendant at great expense, have now been stopped and no income of any sort or kind is derivable, or likely to be derived for some time, from that portion of the property contained in the original building contract.

The defendant applies for relief under this statute asking for a suspension of his indemnity for the 2100*l.* rent during the building restrictions and a final cancellation of any liability therefor during that period. He points out with great force that if the lease of October 27, 1914, with its covenant to pay the full rent of 5000*l.* a year, had not been entered into, the defendant, as assignee of lot B, would have been entitled, either by the lessor's consent or under an order of the Court, to have obtained relief under the Act of 1917.

The plaintiffs' principal contention is that this is a contract of indemnity and therefore does not fall within the scope of this statute. The defendant contends that his covenant is only a covenant to indemnify the plaintiffs against what they shall actually pay on his behalf. That is not quite accurate, because the plaintiffs have already covenanted with the lessor to pay the full 5000*l.* a year, and

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the defendant's covenant is to indemnify the plaintiffs with regard to the portion of that liability relevant to lot B. But this indemnity was obviously based on the assumption that the defendant would, in the ordinary course of events, be able to complete his buildings and be enabled thereby to earn the rent which he covenanted to pay. The present position of the parties, however, is that the plaintiffs are in possession of a valuable profit-earning portion of the land included in the building agreement, whereas the defendant, without the fault of either party, is in possession of the other part, which, under the Order of the Ministry of Munitions, brings him in no rental and is not likely to do so.

Before deciding what relief ought to be granted I desire to say this. The plaintiff company are making very large profits, and are of course paying excess profits duty and income tax. If this indemnity of 2100*l.* a year is obtained from the defendant, and he is directed to pay that sum per annum, the greater part of it will go in relief of taxation. It is suggested that I ought not to consider that matter in deciding what amount I ought to allow the defendant by way of relief. I do not take that view at all. The defendant's power to develop his property and to make income from it has been stopped in the defence of the realm and for the benefit of the country. The Courts (Emergency Powers) Act, 1917, obviously enables the Court to grant relief against payment of rent, and in every such case the taxation otherwise payable by the recipient of the rent would be lost to the State. In this case, assuming that no relief is granted against the covenant to pay the full 5000*l.* a year contained in the lease, the question is how, as between two innocent parties, the plaintiff company and the defendant, the heavy loss of 2100*l.* a year occasioned by the necessities of the country ought to be borne. I think I may perfectly well have regard to the fact that if at the present time the whole of the 2100*l.* a year were paid by the defendant to the plaintiffs the plaintiffs, after paying taxation upon it, would during the ensuing twelve months only receive in fact thereout 294*l.* The relief by way of payment is asked as from June 24, 1916, and, after considering the whole circumstances of the case and the defendant's offer, I think that it will be a proper and fair thing to grant him relief to the extent of 1600*l.* a year. That will leave

him liable to pay the plaintiffs 500*l.* a year as from June 24, 1916 —that relief to continue during the existence of the present building restrictions. There will be liberty to the plaintiffs to apply to vary this order in the event of their net profits, after payment of taxation, becoming insufficient to pay the 5000*l.* a year rent, without taking into account any payment made to them by the defendant. And there must be further liberty to either party to apply in the event of relief being obtained against the lessor in any further proceedings in relation to this building contract and generally. The plaintiffs will have judgment for 1000*l.*, being two years' rent on the above footing. (1)

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Solicitors : *Bartlett & Gluckstein ; Warwick Williams & Co.*

G. R. A.

In re SMITH.
LAWRENCE *v.* KITSON.

[1913 S. 1777.]

PETERSON J.
1918
May 30.

Mortgage—Charge to secure further Advances by Mortgagees to Mortgagor —Collateral Securities deposited by Mortgagees with Mortgagor's Bank to secure Loan Account—Sale by Bank—Proceeds applied in Discharge of Loan Account.

By two memoranda of charge the testator charged in favour of his two sisters his share in an estate in Dominica to secure certain stated sums and such further sums as should be advanced to him by them or either of them. The two sisters at various times deposited securities belonging to them respectively with the testator's bank by way of collateral security for the testator's loan account. After the testator's death the bank realized these securities and applied the moneys in discharge of the testator's loan account :—

Held, that the moneys so applied by the bank were in the nature of further sums advanced to the testator by his two sisters within the meaning of the two memoranda of charge.

ADJOURNED SUMMONS.

On October 9, 1907, the testator executed a memorandum of a charge whereby in consideration of the sum of 1000*l.* stated to be

(1) An appeal from this decision was compromised.

PETERSON J. 1918 SMITH, *In re.* LAWRENCE *v.* KITSON.

then due and owing by him to his two sisters, Agnes Smith and Emily Maude Smith, he charged his share and interest in a certain estate known as the Geneva estate in Dominica for securing repayment to the said Agnes Smith and Emily Maude Smith of the said sum of 1000*l.* "and of such further sum or sums of money (if any) as shall hereafter during the continuance of this security be advanced by them or either of them to me" and thereby agreed to execute a legal mortgage of the property when requested so to do.

On July 17, 1912, the testator borrowed a further sum of 1000*l.* from the said Agnes Smith and Emily Maude Smith, and by a writing under his hand of that date indorsed upon the before-written charge acknowledged his indebtedness to the said Agnes Smith and Emily Maude Smith in the further sum of 1000*l.*, making a total of 2000*l.* then due upon the security of the before-written charge, "which charge is intended to be a collateral security with other charges given by me in respect of not only the sum of 1000*l.* secured thereby but in respect of all other advances made to me at any time by the said Agnes Smith and Emily Maude Smith."

The testator carried on business under the name of F. Wickens Smith & Co., and kept a loan account with the Union of London and Smith's Bank, and his two sisters at his request at various times deposited certain securities belonging to them respectively by way of collateral security for the testator's loan account. These deposits were accompanied with letters or memoranda of deposit in the bank's usual form signed by the two sisters respectively, and were expressed to be made in consideration of the bank making or continuing advances or otherwise giving credit or affording banking facilities to F. Wickens Smith & Co.

The testator died on February 13, 1913, insolvent, and a sum of over 4000*l.* was then owing by him to the bank on the loan account. After the testator's death the bank realized the various securities deposited with them by the two sisters and applied the proceeds of sale in discharge of the amount owing to the bank on the loan account.

This was a creditor's administration action in which, by an order dated May 31, 1916, Eve J. made a declaration that the two memoranda of charge constituted valid equitable charges for the sums advanced by the two sisters respectively to the testator, and an

account was directed to be taken of what sums were properly covered by these charges. (1)

By his certificate, dated March 16, 1918, the Master found there was due under the two memoranda of charge to the said Agnes Smith 623*l.* 16*s.* 1*d.* in respect of sums advanced by her to the testator and to the said Emily Maude Smith the sum of 2029*l.* 19*s.* 7*d.*

The present summons was taken out by Agnes Smith and Emily Maude Smith asking that the certificate might be varied by finding that there were due to them respectively certain additional sums on account of moneys which after the testator's death had been received by the bank by the sale of the securities deposited by the two sisters respectively and applied by the bank in discharge of the testator's loan account.

The question was whether these additional sums were further or other advances made by the two sisters to the testator within the meaning of the two memoranda of charge.

Brydges (for *E. F. Buckley*) for the applicants. The certificate is wrong in not including the additional sums under the account of what is due in respect of further or other advances under the memoranda of charge. The moneys realized by the sale of securities deposited by the applicants as collateral security for the moneys owing on the testator's loan account were in the nature of advances by the applicants to the testator and should be included in the account directed.

J. E. G. de Montmorency for the plaintiff, representing the unsecured creditors. The additional sums claimed by the applicants are properly excluded from the account. The moneys realized by the sale of these securities did not constitute an advance of these further sums by the applicants to the testator, and are not covered by the language of the memoranda of charge. Apart from some observations of Bacon V.-C. in *London Financial Association* v. *Kelk* (2), there appears to be no authority directly in point as to the meaning of the expression money "advanced" or "advances" in this connection. It is straining the language of these memoranda and attaching an unfamiliar technical meaning to the word "advances"

(1) See *In re Smith, Lawrence* v. *Kitson* [1916] 2 Ch. 206.
(2) (1884) 26 Ch. D. 107, 136.

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to treat the moneys advanced by the bank to the testator on the loan account as further advances made by the two sisters to the testator.

PETERSON J. stated the facts and continued: The question now is, whether under the two memoranda of charge the amounts which the two sisters have in substance had to pay through the realization of their securities by the bank are further or other sums of money advanced by them to the testator. I agree that there is some difficulty in saying that when the bank made the advances to the testator on the loan account the advances so made to him by the bank were advances made to him by the two sisters; but it appears to me that the position is totally different now that the bank has realized the securities and applied the proceeds of sale to answer the testator's indebtedness to the bank. If, as I suggested in the course of the argument, the sisters had become sureties, and the bank had called on them as sureties to pay the amount of the debt, the result would have been that they would have paid the money to or for the benefit of the testator at his request since he requested them to become sureties, and in that event I should have felt no doubt that all sums so paid by them were sums advanced by them to or for the benefit of the testator within the meaning of the memoranda of charge. I fail to see that any real distinction can be drawn between that case and the case before me, in which instead of becoming sureties the sisters deposited their own property as security. In my opinion, therefore, as the result of the realization of those securities by the bank and of the application of the proceeds of sale by the bank to the discharge of the testator's debt on the loan account, the moneys so applied ought to be treated as further or other advances made by the sisters to or for the benefit of the testator, and ought properly to be included in the account directed of what is due under the two memoranda of charge, and the Master's certificate must be varied accordingly.

Solicitors for applicants: *Beaumont & Son.*
Solicitor for respondent: *H. E. Lawrence.*

A. C.

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